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JUSTICE STEVENS, JUDICIAL POWER, AND THE VARIETIES OF ENVIRONMENTAL LITIGATION

Kenneth A. Manaster*

INTRODUCTION

1970 was a big year for environmental law. The first of the major federal environmental statutes, the National Environmental Policy Act (“NEPA”), went into force.¹ The first Earth Day was observed.² The federal Clean Air Act underwent revolutionary changes,³ and the United States Environmental Protection Agency (“EPA”) was created.⁴ Many states also passed ambitious environmental legislation and created new agencies. 1970, as is often said, began the “Environmental Decade,” when the basic blueprint was drawn for the building of modern environmental law.⁵

* Professor of Law, Santa Clara University. The author is grateful to the following Santa Clara University law students who energetically and thoughtfully assisted him in preparing this article: Samantha Reardon, Hilary Stevenson, Akshay Verma, and David Weaver. He also greatly appreciates the generous and insightful comments of Professor Bradley Joondeph, and the helpful suggestions made by Professor David Barron following the author’s presentation of this work at the Fordham Law School conference in September 2005.

1. 42 U.S.C. §§ 4321-4370a (2000) (signed into law by President Richard Nixon on Jan. 1, 1970).

2. See Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 Rutgers L.J. 395, 396-97 (1995).

3. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. 7401-7671 (2000)).

4. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 11,677 (July 20, 1970).

5. See, e.g., Lettie M. Wenner, *The Environmental Decade in Court* (1982); Joseph DiMento, *Asking God To Solve Our Problems: Citizen Environmental Suit Legislation in the Western States*, 2 UCLA J. Envtl. L. & Pol’y 169, 184 (1982) (calling the 1970s the “environmental decade”); Miriam Feder, *Failure of the Current Waste Management Policy: The Permit Application Process under RCRA—A Lament*, 18 Envtl. L. 671 (1988) (“In the ‘Environmental Decade’ of the 1970s, Congress addressed many areas of environmental concern with broad regulatory schemes . . .”); A. Dan Tarlock, *Safe Drinking Water: A Federalism Perspective*, 21 Wm. & Mary Envtl. L. & Pol’y Rev. 233, 235 (1997) (noting that “the first environmental decade ended in 1980”); see also Richard J. Lazarus, *The Making of Environmental Law* 67, 84 (2004). Lazarus writes,

The 1970s were an extraordinary decade for environmental law Within just a few years in the 1970s, the federal government brought together and dramatically expanded many of [the fledgling regulatory] programs in an effort to forge a comprehensive legal regime for environmental protection. The fifty states, some preceding and some following the efforts made by the national government, began to do the same The first year of the decade was itself quite remarkable. The bookend events for 1970 were the signing into law of the National Environmental Policy Act (“NEPA”) on the very first day of the decade, followed

1970 was also a big year for John Paul Stevens, because it was the year he became a judge. His appointment to the Seventh Circuit Court of Appeals placed him in a group, the federal judiciary, that many people hoped would become an active force for the advancement of environmental protection. Now, having served five years on the court of appeals and thirty on the U.S. Supreme Court, Stevens has written opinions in at least twenty-five important environmental cases, and participated in many more.⁶ Nevertheless, despite having taken the bench just when environmental laws and litigation were proliferating, he is seldom perceived as a jurist with great impact on environmental law.⁷

There is some historical irony in this, as Stevens was the successor to Justice William O. Douglas. Douglas, an outdoorsman and outspoken conservationist, was widely seen as "a man whose work was as much concerned with nature as with law" and as having "a lifelong commitment to the environment."⁸ Douglas's stirring 1972 dissent in *Sierra Club v. Morton*⁹ expressed the type of environmental values, and assayed the type of tantalizing judicial creativity, that many environmental advocates in that era hoped increasingly to find in federal court decisions. Even quite recently, that dissent was prominently featured in a published collection of Douglas's writings, glowingly entitled "Nature's Justice."¹⁰

The desire of environmental activists for ringing judicial pronouncements of environmental awareness and creative new theories and remedies for environmental ills has not been satisfied, at least not to the degree originally hoped for and not by the Supreme Court. Neither John Paul Stevens, nor any other federal jurist, has emerged as an heir to Douglas's image as a judge consistently ready to raise his voice and wield his power for the unmitigated benefit of nature.¹¹ Instead, Stevens exemplifies, and indeed is

in December by the creation of the U.S. Environmental Protection Agency ("EPA") and the signing of the Clean Air Act on the very last day of the year As the formative decade for modern environmental law, the 1970s left the United States with an extensive array of statutes and legal institutions that have served as the fundamental building blocks for subsequent changes.

Id.

6. According to Richard Lazarus, who applies an expansive definition of environmental cases, the Court decided 243 such cases from the 1969 Term through the 1998 Term. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. Rev. 703, 708 (2000). Lazarus also indicates that Stevens participated in 186 of those, and wrote the Court's opinion in twenty-one. *Id.* at 708 & n.5.

7. *But cf.* Diane L. Hughes, *Justice Stevens's Method of Statutory Interpretation: A Well-Tailored Means for Facilitating Environmental Regulation*, 19 Harv. Envtl. L. Rev. 493 (1995).

8. William O. Douglas, *Nature's Justice: Writings of William O. Douglas* (James O'Fallon ed., 2000) (dust jacket comments); *see also* Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* 336 (2003) ("Spurred by his love of nature, over the years Douglas would spearhead a number of environmental protests to save natural locations under siege.")

9. 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

10. Douglas, *supra* note 8, at 293.

11. *See* Lazarus, *supra* note 6, at 724 ("Justice Douglas may well be the only environmental justice ever on the Court, at least in modern times."); Fredric P. Sutherland &

one of the principal architects of, the federal judiciary's complex and nuanced response to the expectations placed on it early in the Environmental Decade.

This Article explores that response, recognizing that one of its major characteristics is the resolution of many environmental cases through general doctrines of administrative law and statutory interpretation, rather than more specific environmental principles and policies. Most famously displaying this characteristic is Stevens's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹² That Clean Air Act case raised issues of tremendous significance for air pollution control across the country, yet it was decided without any direct analysis of the environmental questions it raised. Although Justice Stevens's best known opinion for the Court thus far was in this environmental case, it was not an environmental law decision.

It might even be said that in *Chevron* and all the other Supreme Court cases involving environmental matters, the Court implicitly has concluded that, as far as the federal courts are concerned, there really is no separate field of "environmental law." As observed by one scholar, "For most of the Court most of the time environmental law raises no special issues or concerns worthy of distinct treatment as a substantive area of law. Environmental protection is merely an incidental context for resolution of a legal question"¹³ This certainly is not what was expected or hoped for by many environmental lawyers, activists, and scholars when the environmental movement and its legal arsenal were new.

The core question to be addressed here is whether Stevens and other judges, while disappointing environmentalists' hopes, have failed to perform a role that they could have and should have assumed, or whether instead they have taken environmental cases in a sound direction and dashed hopes that were unwise or unrealistic in the first place. A related question, perhaps an even more important one, contemplates a middle ground: Are there some things Stevens and others have shunned or ignored that the federal courts should be doing for environmental protection in at least some kinds of cases, even while other sought-after judicial actions in other kinds of cases wisely have been rejected? To state the inquiry a bit differently, is there room in federal cases for judges' own environmental values, or at least their own resolutions of environmental policy disputes, to be a factor, perhaps even an explicit factor, in decision making? Should

Rick Beers, *Supreme Indifference*, Amicus J., Spring 1991, at 38, 39 (discussing Douglas's dissent in *United States v. SCRAP*, 422 U.S. 289 (1975), and stating that "[t]he plain fact is that NEPA has not had a single friend on the Supreme Court since the late William O. Douglas retired in 1975").

12. 467 U.S. 837 (1984).

13. Lazarus, *supra* note 6, at 739-40; see also Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 Minn. L. Rev. 547, 569 (1997) ("[T]he Supreme Court has failed for a variety of reasons to play an effective role in environmental law In short, for the past twenty years or so, the Court has either stayed on the sidelines or participated ineffectually in the making of environmental law.").

there be anything distinctive about environmental law in the courts, as was urged in the early years, as compared to other areas of administrative law and statutory interpretation?¹⁴

Recognizing that Stevens developed as a judge at the same time as environmental law developed as a field, and that he has authored important environmental decisions and participated in so many others, some of his most instructive opinions will be examined as a possible source of answers to these questions. Before digging into them, however, this Article will summarize the environmental movement's early hopes for an active judicial contribution to environmental protection.

Stevens's opinions in environmental cases fall into the following four categories, with some occasional overlaps:

First, cases in which the federal common law of nuisance was relied on.

Second, cases in which government officials or citizen plaintiffs sought direct judicial enforcement of federal statutes.

Third, cases in which judicial review of administrative agency action was conducted under the Administrative Procedure Act¹⁵ or analogous statutory review provisions, and in which it was alleged that the agency action was statutorily unlawful.

Fourth, cases in which it was claimed that constitutional rights or principles were being violated through implementation of environmental, land use, or natural resource regulatory programs.

The first three of these categories will be examined here. It will be seen through Stevens's opinions that judicial approaches to environmental disputes—and thus answers to the questions posed here—ought to vary considerably from one of these categories to another.

Nuisance cases exemplify the greatest possible judicial role, though that role is now moribund. Direct enforcement cases present a greater possible function than is usually recognized. In that regard, a corollary of Stevens's *Chevron* opinion in the third category, judicial review of agency action, indicates that in some direct environmental enforcement cases there is room, as well as need, for a more substantial and explicit judicial role.

Examination of the third category will focus principally on *Chevron*, demonstrating Stevens's clarification of foundational relationships among the legislative, executive, and judicial branches. Because his views in this realm are clear and well-known, and have been extensively analyzed elsewhere, they will not be explored in depth. However, *Chevron*'s implications for enforcement cases, including cases under the National Environmental Policy Act, will be addressed.

The fourth category includes a great variety of environmental cases raising constitutional claims related to statutory preemption, regulatory

14. For arguments on the distinctiveness of environmental law in judicial hands, see Lazarus, *supra* note 5.

15. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

takings, the Commerce Clause, standing to sue, state immunity, separation of powers, and much more. These will not be examined, although obviously short shrift here does not suggest lesser importance. To the contrary, the tremendous significance and complexity of this area, and the extraordinary volume of scholarship devoted to the judicial role in constitutional interpretation, suggest that only hubris would warrant an attempt at worthwhile analysis of this expansive category in this Article.

In general, my hope is that better understanding of Justice Stevens's jurisprudence in environmental cases will create a closer alignment between reality and expectations in environmental law—between the reality of judicial power in different types of disputes and the expectations of activists, lawyers, regulated entities, the public, and even judges about what the courts can do.

A caveat may be appropriate at the outset. It is simply an acknowledgment of both my long-standing admiration for John Paul Stevens and our friendship. I have known him since 1968, and we worked closely together on a career-transforming case in the summer of 1969 when we were each in private practice in Chicago. The following year, he became a judge and I became an environmental lawyer. Having elsewhere written the story of what Stevens did in 1969,¹⁶ I now offer some thoughts on an important aspect of what he has been doing since 1970.

I. HOPES FOR THE COURTS

Lawyers and law professors were prominent participants in the environmental movement as it began. They voiced both high hopes and strong determination that the judiciary would be a major force for environmental protection. At times, these hopes were expressed in a sophisticated manner, recognizing and evaluating established limitations on the judicial role. At other times, the statements reflected more zeal than sophistication. Exalted notions of what judges could do were contrasted with derogatory notions of what legislatures, and especially “bureaucrats,” could not be expected to do.

Amidst these varying declarations, it was clear that many people both inside and outside the legal profession were looking to the courts to advance the cause. Support for these hopes occasionally was found in a handful of court cases during the 1960s and early 1970s that seemed to forecast a more active judicial role in protecting environmental quality.¹⁷

16. Kenneth A. Manaster, *Illinois Justice: The Scandal of 1969 and the Rise of John Paul Stevens* (2001).

17. Richard Lazarus has noted,

The first widely celebrated environmental case was *Scenic Hudson Preservation Conference v. Federal Power Commission*, argued in 1965 before the U.S. Court of Appeals for the Second Circuit [354 F.2d 608 (2d Cir. 1965)] *Scenic Hudson* established a pattern for environmental litigation in general that persisted throughout the 1970s The courts, accordingly, justified the application of a

Amidst the flood of publications on environmental matters, a series of articles in *Fortune* magazine in 1969 and 1970 reflected common perspectives on the burgeoning environmental movement.¹⁸ One article described environmental activists' objectives and strategies as follows:

To shake bureaucrats—and businessmen—out of their frozen attitudes, conservationists are deliberately seeking stormy confrontations, sometimes with celebrated opponents chosen in order to generate the maximum publicity. Later, when some big battles have been won, they may be more accommodating. Right now they want to establish their legitimacy and power.

The front line of this war is in the courts. Judges are more receptive to change than bureaucrats, and their decisions tend to have more weight and clarity. Joseph L. Sax, a Michigan University [sic] professor of law who is writing a book about environmental law, says, "We are beginning to see value in maintaining resources rather than merely exploiting them. The courts are going to have to respond to this new perspective."¹⁹

How the courts might respond to this new perspective, in what types of cases with what types of doctrines, was not usually spelled out. At times, ambitious assertions were made, even sometimes on constitutional grounds, about the environmental interests that could be vindicated in court:

The right of the people to enjoy the environment is also said to be a *civil right*, stemming from the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States Further, it may be argued that a state which either affirmatively or permissively sanctions the pollution of the environment thus grants a property right to a polluter to do as he pleases, while failing to protect the rights of other citizens to a clean environment. Such action by a state, county or city in effect is a denial of the equal protection of the laws to its citizens as well as a taking of their property right without due process of law, all in violation of the Fourteenth Amendment.²⁰

more exacting standard of judicial review (a "hard look") designed to ensure that agencies provided sufficient consideration to the public's environmental concerns. Richard J. Lazarus, *The Making of Environmental Law* 81 (2004).

18. The Editors of *Fortune*, *The Environment: A National Mission for the Seventies* (1970).

19. Jeremy Main, *Conservationists at the Barricades*, in The Editors of *Fortune*, *supra* note 18, at 170; see also Frederick R. Anderson et al., *Environmental Protection: Law and Policy* 144-45 (3d ed. 1999) ("In the early 1970s, environmentalists relied heavily on the courts to police what were perceived as hostile agencies with primarily development-oriented missions."). Whether the focus on the courts primarily reflected broad public confidence in judges' power and ability, or simply the brash self-confidence of newly minted environmental lawyers about what they believed they could get the courts to do, is open to question. The *Fortune* article noted, "Young lawyers see in the conservation battle an opportunity to work in a higher cause, just as other young lawyers found a cause in the civil-rights movement." Main, *supra*, at 174.

20. Richard T. Marshall & Larry H. Schwartz, *What Can the Citizen Do About Air Pollution*, in *The Environmental Law Handbook* 122 (Norman J. Landau & Paul D. Rheingold eds., 1971). Marshall and Schwartz's paper originally was prepared for the League of Women Voters chapter in El Paso, Texas.

Some judges sounded eager to take on the environmental challenge.²¹ In reversing a lower court decision that would have required the Army Corps of Engineers to issue a permit to allow filling of tidelands, a panel of federal appellate judges took a dramatic stance:

It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of our environment. . . . We hold that nothing in the statutory structure compels the Secretary [of the Army] to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy.²²

Reviewing early judicial statements of this sort, one commentary observes, "[J]udges in the early 1970s began to perceive the relationship between humankind and the natural environment differently and to incorporate those new perceptions into their legal reasoning, with potentially radical implications."²³

21. See Lazarus, *supra* note 17, at 88 (noting that the courts "were practically enthusiastic in their welcome" of the expected flood of new environmental litigation); see also Anderson et al., *supra* note 19, at 150 ("The 'environmental decade' of the 1970s was a time when courts seemed the most open forum to raise environmental issues . . .").

22. Zabel v. Tabb, 430 F.2d 199, 200-01 (5th Cir. 1970).

23. Lazarus, *supra* note 17, at 66. Lazarus also summarizes a few judicial opinions that expressed these new perceptions, including Justice Hugo Black's dissent from the Supreme Court's 1970 denial of certiorari of an environmental group's challenge to a highway project: "Justice Black wrote passionately about the necessity for effective environmental protection laws to ensure humankind's 'very survival.'" *Id.* at 65 (quoting *Named Individual Members of the San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 400 U.S. 968 (1970) (Black, J., dissenting)). Similarly, an early study of judicial decisions under NEPA stated,

Although a general trend may exist reflecting wide dissatisfaction with numerous aspects of administrative performance, there may be a special reason why the courts have so closely reviewed agency decision making in the environmental area. Agency decisions in this area more frequently involve vital personal interests such as life, health, and safety which, if offered inadequate protection or allowed to be abused, could conceivably have far more injurious consequences to the public than agency abuse of traditional functions of economic regulation. There is a great deal of difference between regulating the securities market, and establishing levels at which air pollution poses an imminent danger to health; between awarding broadcast licenses, and determining the hazardoussness of a pesticide; between fixing maximum rates that can be charged for livestock, and setting human health tolerances for asbestos, beryllium, or mercury. The courts may have concluded that the principles of judicial review forged in the heyday of economic regulation are not adequate for today's agency decisions which vitally affect health and other personal interests. . . .

Further, the courts may also be searching for the special interest which is at stake in environmental controversies where life and limb are *not* threatened, but

The most extensive of the sophisticated calls for an expanded judicial role were sounded in the scholarship of Professor Joseph Sax, then of the University of Michigan Law School. In a 1970 article, he made a powerful case for expansion of the public trust doctrine.²⁴ He argued for its application to environmental problems—such as air pollution, pesticide use, and strip mining—far beyond its traditional domains. Also, while conceding that courts should not ordinarily “rule directly that a policy is illegal because it is unwise,”²⁵ he nonetheless urged, on a variety of grounds, that a more aggressive judicial role should be pursued. He stated, for example,

[The courts] may effectively overrule a questionable policy decision by requiring that the appropriate agency provide further justification; alternatively, the courts may, in effect, remand the matter for additional consideration in the political sphere, thus manipulating the political burdens either to aid underrepresented and politically weak interests or to give final authority over the matter to a more adequately representative body.²⁶

Sax pursued this line of argument more comprehensively in an influential book he published early in 1971.²⁷ Once again, he sounded a call for judicial action but did not ignore the complexity of the relationships among the courts, the legislature, administrative agencies, and the public. Nonetheless, his demand for change was unmistakable. One reviewer approvingly noted, “Joseph L. Sax has proposed in his book a re-shaping of this country’s courts that may radically increase the power of conservation groups.”²⁸

Without attempting here to summarize the book’s main points—or Sax’s model statute, which Michigan and other states adopted—a few of his statements are offered to give the flavor of his argument for an enhanced judicial role. For example, he acknowledged standard legal doctrines that restrain a judge from enjoining a project such as a proposed highway unless an express statutory provision had been violated or the government agency

less tangible aesthetic and psychological experiences are nevertheless in need of protection.

Frederick R. Anderson, NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act 21-22 (1973); see also William H. Rodgers, Jr., Handbook on Environmental Law 16 (1977) (“The preferred status of environmental concerns is well established. They involve fundamental interests of life and health which have always had a special claim to judicial protection.” (internal quotation omitted)). The lively debate carried on in the early 1970s in judicial opinions and law review articles among Judges David Bazelon, Harold Leventhal, Carl McGowan, and J. Skelly Wright of the D.C. Circuit Court of Appeals concerning the judicial role in environmental litigation is summarized in Gary Lawson, Federal Administrative Law 257-61 (3d ed. 2004).

24. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

25. *Id.* at 558.

26. *Id.*

27. Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (1971).

28. Robert A. Jones, *Bringing Environment to Court*, The New Republic, July 3, 1971, at 27.

had acted arbitrarily or capriciously. In response to these doctrines, he said, "These conventional constraints upon the role of the judiciary—a product of the grip which the administrative approach now has upon the governmental process—have seriously retarded and distorted the proper role of the courts in dealing with environmental disputes."²⁹

Similar expressions with varying emphases appear throughout the book:

The significant potential strength of the judiciary in correcting environmental misconduct is sapped because courts hesitate to inquire into the merits, rather than the peripheral legalities, of environmental issues. A theory and mechanism for implementing enforceable public rights remain to be developed.³⁰

Here one reaches the central point about environmental litigation: the role of courts is not to make public policy, but to help assure that public policy is made by the appropriate entity, rationally and in accord with the aspirations of the democratic process.³¹

Courts have many devices available that enable them to act in a discriminating fashion without taking on overtly the function of weighing the quality of various kinds of legislation.³²

While the theme of this book has been a plea for greater judicial intervention, it should be eminently clear that our goal is to create *additional* leverage for the citizen—to add to, not diminish, the opportunities for redress; to improve and provoke the democratic process, not to constrain it. Courts are powerful enough so long as they are enabled to build a common law for the environment, remand dubious proposals to the legislatures, and declare moratoria.³³

Sax's words, and the words of others around that time—including other scholars and some judges³⁴—are illustrative of the hopes for the courts that

29. Sax, *supra* note 27, at 126.

30. *Id.* at 135.

31. *Id.* at 151.

32. *Id.* at 157.

33. *Id.* at 239.

34. Christopher Stone has argued,

[C]ourts, in making rulings that may affect the environment, should be compelled to make findings with respect to environmental harm—showing how they calculated it and how heavily it was weighed—even in matters outside the present Environmental Protection [sic] Act. . . . [T]he appellate courts, through their review and reversals for "insufficient findings," would give content to, and build up a body of, environmental rights, much as content and body has [sic] been given, over the years, to terms like "Due Process of Law."

Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 485 (1972). Similarly, in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, Judge Wright wrote,

These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a

were being declared at about the time John Paul Stevens went on the bench. It remained to be seen whether he, and other judges and Justices, would choose the path so ardently urged on them.

II. VARIETIES OF CASES

A. *Federal Common Law of Nuisance*

1. *Illinois v. City of Milwaukee* (1972)—Opinion by Justice Douglas

In this first category of environmental cases, Justice Douglas set the stage for Stevens and the other Justices in the Environmental Decade. Douglas's lengthy service on the Supreme Court continued through the first half of the decade. During that time he authored a handful of the Court's decisions in environmental cases, perhaps the most important of which was *Illinois v. City of Milwaukee*.³⁵ His opinion for a unanimous Court was issued on April 24, 1972.³⁶ In retrospect, this opinion set the high watermark for the Court's assertion of federal judicial power to decide environmental cases on their environmental merits.

The case was brought by the State of Illinois against Milwaukee and a few other Wisconsin local government units. It sought to invoke the Supreme Court's original jurisdiction to hear controversies between states. At issue was the claim, forcefully argued and later proven by the Attorney General of Illinois,³⁷ that the Wisconsin defendants were discharging massive quantities of inadequately treated sewage into Lake Michigan, polluting areas of the lake within Illinois. The plaintiff's request, as Douglas described it, was simple to state and, as Supreme Court cases go, rather unusual: "Plaintiff asks that we abate this public nuisance."³⁸

The bulk of Douglas's opinion asks whether the Court must exercise its original jurisdiction in this instance or whether it has discretion either to take the case or to send Illinois to another forum. After examining pertinent constitutional, statutory, and precedential sources, he concludes, "While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an appropriate district court whose powers are adequate to resolve the

reality. Therein lies the judicial role. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.

449 F.2d 1109, 1111 (D.C. Cir. 1971) (citation omitted).

35. 406 U.S. 91 (1972).

36. *Id.* Douglas's famous dissenting opinion in *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972), was issued five days earlier. Four other environmental cases in which Douglas wrote the Court's opinion during these years are identified in Lazarus, *supra* note 6, at 787-90.

37. The author served during this period as an Illinois Assistant Attorney General and worked in a minor capacity on this litigation.

38. *Illinois v. City of Milwaukee*, 406 U.S. at 93.

issues.”³⁹ From the perspective of the Illinois Attorney General and environmental groups supportive of his case, the Court’s choice not to hear the dispute itself was disappointing. In contrast, Douglas’s comments on the federal district court’s “powers . . . adequate to resolve the issues” were music to their ears.⁴⁰

Drawing on prior Supreme Court decisions resolving interstate water pollution or water allocation disputes, and relying heavily on a recent federal appellate decision,⁴¹ he confirmed the viability of Illinois’s cause of action: “When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as *Texas v. Pankey*, 441 F.2d 236, recently held.”⁴² Douglas expressed the fundamental rationale for federal common law in such cases as follows:

[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . . Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States.⁴³

It is probably impossible to devise “a uniform rule of decision” to govern public nuisance cases, even for a group of cases in which multiple states would claim to be adversely affected by a single polluter. Nuisance cases, almost by definition, are quite fact and locale specific.⁴⁴ Accordingly, Douglas probably should be seen as largely, if not entirely, resting the need for federal judge-made law on “basic interests of federalism” arising in interstate pollution controversies. Douglas does not explain more fully what those “basic interests” are, though earlier cases he relies on had already done so.⁴⁵

Douglas also supports the Court’s conclusion as to the vitality of federal nuisance law by explaining the significance of federal water pollution statutes. He concedes, “It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.”⁴⁶ Nonetheless, he concludes that preemption time has not yet arrived:

39. *Id.* at 108.

40. *Id.*

41. *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

42. *Illinois v. City of Milwaukee*, 406 U.S. at 103.

43. *Id.* at 105 n.6.

44. *Cf. id.* at 106 (discussing interstate water allocation disputes and stating that “[t]he applicable federal common law depends on the facts peculiar to the particular case”).

45. *See, e.g., id.* at 104 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi* sovereign interests; and the alternative to force is a suit in this court.

Id.

46. *Id.* at 103.

The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. . . . While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision.⁴⁷

Instead, he relies on an earlier labor decision in which the Court found a need for judges to fashion substantive law based on statutory policy when problems arise that are not specifically addressed in the statutory language but rather "lie in the penumbra of express statutory mandates."⁴⁸ Such problems "will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."⁴⁹

In these statements, Douglas was attempting to harmonize his reinvigoration of federal interstate nuisance law with existing federal water pollution statutes—into some of which he had breathed new life over the previous dozen years.⁵⁰ He was not simply asserting judicial power to interpret and apply federal statutes in accordance with their express or implied statutory policies. Instead, he was arguing for judges' independent, common law power to go beyond the scope of those statutes, informed by their objectives and terms, but not limited by them.⁵¹

Douglas's opinion thus speaks to the basic problem that has come before the federal courts again and again in various types of environmental cases: Is there a separate role for "judicial inventiveness," in doctrine or remedy or both, in environmental disputes? Douglas had no doubt about the answer in interstate pollution disputes: "[F]ederal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. . . . There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely

47. *Id.* at 103 & n.5.

48. *Id.* (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957)).

49. *Id.*

50. See discussion *infra* Part II.B.

51. Douglas's opinion evidences full awareness of both the old and new statutory and regulatory tools available at the time for addressing problems such as interstate water pollution. He cites not only the Rivers and Harbors Act of 1899, and the Federal Water Pollution Control Act, but also the recent, aggressive, and controversial proposal by the Army Corps of Engineers to implement a water pollution discharge permit program under the 1899 legislation. *Illinois v. City of Milwaukee*, 406 U.S. at 101-02. Douglas even quotes provisions of the National Environmental Policy Act, although that Act had no relevance to the Lake Michigan dispute at all. *Id.* Either ingeniously, or disingenuously, Douglas relies on these sources to support the need for federal law, rather than state law, to control interstate water pollution disputes. The logical inference would seem to be that the federal law that should control is precisely those federal statutory and regulatory measures. Douglas takes the implication in a different direction, toward separate common law power residing in the federal judiciary.

govern.”⁵² Quoting from one of the Court’s water allocation decisions, he speaks of “the delicate adjustment of interests which must be made.”⁵³

In *Illinois v. City of Milwaukee*, the Supreme Court, speaking through Justice Douglas, declared that in interstate pollution disputes federal judges were empowered to make “the delicate adjustment of interests” which is inherent in nuisance cases. The “informed judgment” of the judges, as they would pour specific content from each case into the general language of nuisance doctrine and as they would devise remedies for injured plaintiffs, was to be brought directly to bear on these major environmental conflicts.

2. *Stream Pollution Control Board v. United States Steel Corporation*
(1975)—Opinion by Judge Stevens

Almost three years after *Illinois v. City of Milwaukee*, Judge Stevens of the Seventh Circuit paid his first visit to the federal common law of nuisance. In *Stream Pollution Control Board v. United States Steel Corp.*,⁵⁴ the State of Indiana’s Stream Pollution Control Board had sued the steel company for water pollution discharges from its Gary, Indiana, plant into the Grand Calumet River.⁵⁵ The river was described as “a navigable stream and a tributary of Lake Michigan, a body of interstate water.”⁵⁶ In addition to allegations that the company was violating the Board’s regulatory limits on discharges under state law, the amended complaint included a federal common law nuisance claim.⁵⁷

The principal thrust of the court’s decision was an individual Indiana citizen’s attempt to intervene in the case on the basis of the citizen suit provisions of the Federal Water Pollution Control Act Amendments of 1972.⁵⁸ Stevens concluded that the statutory intervention right was not available to the individual because a nuisance action was not the type of statute-based suit for which the Act authorized citizen intervention.⁵⁹

Before resolving the intervention question, however, Stevens explained that it was necessary to decide whether the district court even had jurisdiction over the underlying claim. This task required attention to *Illinois v. City of Milwaukee*. Stevens immediately recognized that this Indiana case did not share that decision’s key characteristic—that is, the alleged “impairment of the environmental interests of one state by sources outside its domain.”⁶⁰ He concluded that the jurisdictional question “is

52. *Id.* at 107-08.

53. *Id.* at 106 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)).

54. 512 F.2d 1036 (7th Cir. 1975).

55. *Id.* at 1038.

56. *Id.*

57. *Id.* at 1039.

58. *Id.* at 1038 & n.1.

59. *Id.* at 1041.

60. *Id.* at 1039.

therefore not necessarily answered by the holding" of the Supreme Court in the earlier dispute.⁶¹

Nonetheless, Stevens found jurisdiction because the federal claim raised by the Board was not "merely colorable" or "asserted solely for the purpose of conferring jurisdiction on the district court to decide the state law issues."⁶² The basis for his conclusion was an expansive reading of Justice Douglas's language in *Illinois v. City of Milwaukee*. Stevens raised a number of intriguing possibilities as to the meaning of Douglas's "repeated references to the controlling importance of federal law applicable to the pollution of 'interstate or navigable waters.'"⁶³ Stevens continued,

Those references may well imply that the federal common law of public nuisance extends to all of our navigable waters, and perhaps to all tributaries of interstate waters. We cannot tell from the Court's opinion, however, whether, apart from statute, the federal interest in navigability would support a nuisance action without any allegation of interference with navigation, or whether the interest in the purity of interstate bodies of water is sufficient to justify nonstatutory federal protection of all tributaries.⁶⁴

Stevens quickly noted that it was not necessary to resolve these questions in order to decide the preliminary, jurisdictional issue at hand.

Two things are striking about this opinion, in addition to its implicit demonstration of Stevens's ability to probe incisively into the meanings of a precedent. First, Stevens allows for the possibility of an extraordinarily wide application of federal nuisance doctrine. Depending on how the questions he poses were answered, it might be found that an Indiana plaintiff suing an Indiana discharger could receive "nonstatutory federal protection" against pollution impacts in an Indiana tributary of an interstate water body.⁶⁵ Obviously this result would give Douglas's opinion, and federal nuisance law, significance far beyond the Supreme Court's holding and perhaps even beyond Douglas's contemplation. It appears, in other words, that Judge Stevens was not only comfortable with Douglas's delineation of an independent, nonstatutory judicial function in certain types of environmental cases, but also could envision its considerable expansion.

Second, Stevens mentions the amendments to the federal water pollution statute that were passed about six months after *Illinois v. City of Milwaukee*, and "the regulations promulgated thereunder" in ensuing years. He observes that the court need not decide whether these developments amount

61. *Id.*

62. *Id.* at 1040.

63. *Id.*

64. *Id.*

65. Stevens also notes the defendant's argument that only conflicts "between sovereigns" are covered by federal nuisance doctrine. *Id.* at 1040 n.9. He recognizes, however, that various district courts already had allowed the federal government to rely on the doctrine in pollution abatement actions against private companies. *Id.*

to the preemption of the federal common law of nuisance which Douglas had conceded as a future possibility. What Stevens did not know, of course, was that soon, as a Supreme Court Justice, he would revisit precisely this question.

3. *City of Milwaukee v. Illinois* (1981)—Dissenting Opinion by Justice Blackmun and *Middlesex County Sewerage Authority v. National Sea Clammers Association* (1981)—Concurring and Dissenting Opinion by Justice Stevens

His opportunity to reexamine the question came in 1981, when *City of Milwaukee v. Illinois* was decided and Stevens, along with Justice Marshall, joined Justice Blackmun's dissent.⁶⁶ In another preemption case soon thereafter, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, Stevens emphasized that Blackmun's dissent "exposed in detail the flaws in the Court's treatment of this issue."⁶⁷ Accordingly, Blackmun's dissent offers insight into the evolution of Stevens's views on the vitality of federal nuisance law.

Nine years after the Supreme Court gave Illinois the green light to pursue its nuisance claim against the Wisconsin cities, and despite the tremendous expenditure of effort and resources by all parties and the lower courts as Illinois did so, *City of Milwaukee v. Illinois* held that the claim was preempted by the 1972 amendments to the Federal Water Pollution Control Act. Justice Blackmun derided this ruling as a finding "that this 9-year judicial exercise has been just a meaningless charade."⁶⁸

His dissent echoes Justice Douglas's approach in the original *Illinois v. City of Milwaukee* decision and argues again for a continued, separate power in the federal courts to apply nuisance doctrine as a supplement to federal environmental statutes. Early in the dissent, Blackmun refers to the Court's "frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies."⁶⁹ His point, later made explicit, is that "*Illinois v. Milwaukee* did not create the federal common law of nuisance."⁷⁰ Congress, he urges, was aware of both the prior federal common law and the *Illinois* decision when it amended the water pollution statute later in 1972. Blackmun's analysis of the statute and its legislative history leads him to conclude that Congress did not intend to eliminate the federal common law. Instead, he says, there is

a deeply rooted, more specialized federal common law that has arisen to effectuate federal interests embodied either in the Constitution or an Act of Congress. Chief among the federal interests served by this common

66. *Illinois v. City of Milwaukee*, 451 U.S. 304, 333-47 (1981) (Blackmun, J., dissenting).

67. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 31-32 (1981) (Stevens, J., concurring in part and dissenting in part).

68. *Illinois v. City of Milwaukee*, 451 U.S. at 333 (Blackmun, J., dissenting).

69. *Id.* at 334.

70. *Id.* at 337.

law are the resolution of interstate disputes and the implementation of national statutory or regulatory policies.⁷¹

As he makes this argument, rejected by the Court's majority, Blackmun recognizes the difficulty of the task of delimiting the proper scope of separate judicial power:

Inevitably, a federal court must acknowledge the tension between its obligation to apply the federal common law in implementing an important federal interest, and its need to exercise judicial self-restraint and defer to the will of Congress. Congress, of course, may resolve this tension by making it known that flexible and creative judicial response on a case-by-case basis must yield to an interest in certainty under a comprehensive legislative scheme. At the same time, the fact that Congress *can* properly check the courts' exercise of federal common law does not mean that it has done so in a specific case. . . . To say that Congress "has spoken" is only to begin the inquiry; the critical question is what Congress has said.⁷²

Again relying on the thrust of Justice Douglas's *Illinois* opinion, Blackmun notes that the Court in early 1972 had regarded Congress's "expressions of congressional intent [in the water pollution statute] as not an obstacle but an incentive to application of the federal common law."⁷³

Nine years later, however, the majority reads the amended statute toward the opposite result, thus undercutting, in Blackmun's words, "the continued existence of supplemental legal and equitable solutions to the broad and serious problem addressed" by Congress.⁷⁴ Near the end of his dissent, Blackmun emphasizes the capability of federal judges to resolve interstate public nuisance disputes:

Whether a particular interference qualifies as unreasonable, whether the injury is sufficiently substantial to warrant injunctive relief, and what form that relief should take are questions to be decided on the basis of particular facts and circumstances. The judgments at times are difficult, but they do not require courts to perform functions beyond their traditional capacities or experience.⁷⁵

Less than two months after the *Milwaukee* decision, Justice Stevens reinforced Blackmun's appreciation of federal judicial capabilities in a partial concurrence and dissent in the *National Sea Clammers* case. Stevens wrote,

Since the earliest days of the common law, it has been the business of courts to fashion remedies for wrongs. . . . Although the federal courts do not possess the full common-law powers of their state counterparts, . . .

71. *Id.* at 334-35 (citation omitted).

72. *Id.* at 339 n.8 (citation omitted).

73. *Id.* at 338.

74. *Id.* at 342.

75. *Id.* at 349.

the fashioning of remedies for wrongs has traditionally been a part of the business of the federal courts.⁷⁶

Stevens's separate opinion addresses the availability of private causes of action for damages for violation of certain environmental statutes aimed at ocean pollution⁷⁷ and also addresses the availability of a federal common law nuisance claim in this situation. In both of these aspects, he evinces high regard for the ability and traditional power of federal judges. He criticizes the majority for reading the statutory language and legislative history erroneously and concluding that Congress intended the remedies in these particular statutes to be exclusive. Stevens would not so readily restrict or eliminate judicial power: "No matter how comprehensive we may consider a statute's remedial scheme to be, Congress is at liberty to leave other remedial avenues open."⁷⁸ Stevens's analysis finds "both express statutory language and clear references in the legislative history indicating that Congress did not intend the express remedies in the Clean Water Act [and the marine sanctuaries statute] to be exclusive."⁷⁹ Accordingly, he would find that a private cause of action under other statutory authority, 42 U.S.C. § 1983, remained fully available.

Additionally, Stevens rejects the majority's finding that the federal common law claim for ocean pollution was preempted by the Clean Water Act. As mentioned above, Stevens relies on the earlier Blackmun dissent to expose the flaws in the majority's view. Additionally, Stevens observes that Blackmun's reasoning "applies with special force in this case."⁸⁰ The ocean pollution case was based on allegations that the federal environmental statutes were being violated by the defendants. In contrast, in *City of Milwaukee v. Illinois* the defendants appeared to be in compliance with Clean Water Act requirements. Stevens's point is that the downside of tying the federal courts' hands is bad enough when it is claimed that more environmental protection is needed than the statutory scheme is providing, but it is even worse when the statutory scheme is being violated. In either context, he seems to be saying, the traditional and separate power of the federal courts to do something about interstate public nuisances should not be forfeited.

Unless Congress very clearly indicates to the contrary, Stevens, like Blackmun, would keep alive the power of a federal judge to make a "flexible and creative judicial response on a case-by-case basis" to

76. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 24 & n. 7 (1981) (Stevens, J., concurring in part and dissenting in part).

77. Although Stevens concurs with the majority's conclusion that the environmental statutes in question do not allow for a private cause of action, he dissents from the majority's view that those statutes preclude private claims based on another statute, 42 U.S.C. § 1983 (1976 ed., Supp. III).

78. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 28 (1981) (Stevens, J., dissenting).

79. *Id.* at 28-29.

80. *Id.* at 32.

environmental litigation where important "federal interests" are at stake.⁸¹ Just as Judge Stevens in 1975 was open to expansive "nonstatutory federal protection" of the environment through nuisance doctrine, so too was Justice Stevens in 1981 still open to it and resistant to statutory interpretations that would foreclose it.

4. *Arkansas v. Oklahoma* (1992)—Opinion by Justice Stevens

Justice Stevens's next opinion addressing federal nuisance law emerged in 1992 when he wrote the Court's unanimous decision in *Arkansas v. Oklahoma*.⁸² This interstate dispute was not framed as a common law action. Instead, it was a set of contending judicial review petitions filed by both states challenging various aspects of a water pollution discharge permit issued by the EPA. Stevens's brief discussion of the Court's earlier nuisance decisions was needed only to set the stage for close examination of certain Clean Water Act provisions. Those provisions concerned whether the EPA was required in some manner to safeguard Oklahoma's water quality standards when the Agency issued the permit for discharges into an Arkansas stream whose flow eventually would enter Oklahoma waters. Whether or not Stevens still adhered to his earlier views on nuisance law cannot be discerned, however, for in this decision he simply reiterated the preemption conclusion that the Court had reached—what "we held"—in *City of Milwaukee v. Illinois*.

As was immediately evident, "the broadest significance of the Court's newest water pollution decision, *Arkansas v. Oklahoma*, is its implicit confirmation that the role of the federal courts in interstate water pollution disputes is now very limited indeed [T]here [is] no longer judge-made nuisance law for the federal courts to wrestle with in these cases"⁸³ By the time of this decision, of course, Stevens had already written *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, and the EPA's challenged permit for the Arkansas discharger was to be evaluated by the Court from that perspective.⁸⁴ The separate power of the federal judiciary to tackle interstate environmental disputes through federal common law—the power Douglas reinvigorated and Blackmun and Stevens unsuccessfully fought to preserve—was gone.

Blackmun had acknowledged that there was a difficult "tension" to resolve in ascertaining the proper scope of this power relative to the judicial obligation to "defer to the will of Congress" and the value of "certainty under a comprehensive legislative scheme."⁸⁵ In his 1975 appellate court opinion, Stevens had allowed for federal judges to use a proverbial scalpel

81. *City of Milwaukee v. Illinois*, 451 U.S. 304, 339 n.8 (1981) (Blackmun, J., dissenting).

82. 503 U.S. 91 (1992).

83. Kenneth A. Manaster, *Commentary*, 1992 Cal. Envtl. L. Rep. 162.

84. Accordingly, the great bulk of this decision would be categorized under the judicial review of agency action heading discussed *infra* Part II.C.

85. *City of Milwaukee v. Illinois*, 451 U.S. at 339 n.8 (Blackmun, J., dissenting).

to dissect possible resolutions of this tension in environmental cases. By 1992, however, the majority's meat cleaver in *Milwaukee* had resolved the tension by cutting off this separate judicial power, apparently once and for all. Since then, neither Stevens nor any other Justice seems to have tried to reconnect it.

B. Direct Judicial Enforcement

1. *United States v. Republic Steel Corporation* (1960)—Opinion by Justice Douglas and *United States v. Standard Oil Company* (1966)—Opinion by Justice Douglas

In cases seeking direct judicial enforcement of environmental statutes,⁸⁶ just as in the federal nuisance cases, Justice Douglas's views provide an important backdrop. Environmentalists' hopes in the 1970s for active judicial support found strong encouragement in two decisions he wrote a few years earlier. Both cases were brought by the federal government, seeking enforcement of a statute for the protection of waterways. The first case, *United States v. Republic Steel Corp.*,⁸⁷ requested that certain steel mills be enjoined from discharging solid industrial wastes into the Calumet River in Illinois.⁸⁸ When the controversy reached the Supreme Court, the issue was whether discharging the solids without a permit from the Army Corps of Engineers was prohibited by section 10 of the Rivers and Harbors Appropriation Act of 1899.⁸⁹ The government claimed the discharges violated the Act as an impermissible "obstruction . . . to the navigable capacity" of the river.⁹⁰ In an opinion by Justice Douglas, five members of the Court concluded that the discharges created an "obstruction" and thus violated section 10 of the Act.⁹¹

In part, Douglas's opinion seems to be a straightforward search for Congressional meaning through examination of statutory language, prior

86. Cases in this category are labeled as "direct" judicial enforcement to emphasize that the complaining party is invoking a court's own statutory power to apply and enforce a civil or criminal proscription. In some of these cases, the effort is to secure judicial enforcement of the statute as elaborated further through agency regulation or guidance. In those instances, as well as when there is no such agency supplementation of the statute, it is the court's own enforcement powers that are invoked. These direct enforcement cases stand in contrast to cases described *infra* Part II.C under the category of judicial review of agency action. In some of those instances, the agency action in question is itself an attempt at enforcement, usually through an adjudication. The court's judicial review function then is not usually described as enforcement, but if it were, it would seem best to label it as indirect because it is essentially oversight of the agency's exercise of its own enforcement powers, rather than an exercise of enforcement powers vested in the court itself.

87. 362 U.S. 482 (1960).

88. This river is part of the family of rivers in northwestern Indiana and northeastern Illinois which includes the Grand Calumet River involved in the *Stream Pollution Control Board* case discussed *supra* Part II.A.

89. 33 U.S.C. § 403 (2000).

90. *Id.*

91. *Republic Steel Corp.*, 362 U.S. at 485.

legislation, and judicial precedents. Four dissenting Justices, however, thought that Douglas's interpretation erroneously characterized as "clear and simple" a statutory scheme whose provisions "are complex and their legislative history tortuous."⁹² This type of disagreement is not notable in and of itself, though it suggests that the case was not as clear-cut as Douglas portrayed it.

More notable is the degree to which Douglas's opinion unequivocally, and correctly, assumes the judiciary's primary power to interpret the statute at issue.⁹³ On this point, in this type of case, there would seem to be no room for disagreement: Once Congress has entrusted the courts with statutory enforcement powers, it inescapably and ultimately is for the courts to declare the meaning of the statutory language Congress has used. The realm of contention, of course, concerns the meanings of specific words and phrases, and the acceptable sources to be consulted for help in ascertaining those meanings.

Also emphasizing the primacy of the judicial role in a direct enforcement case is the secondary role Douglas assigns to "a rather precise history of administrative construction of the 1899 Act as it applies to the deposit of solids in the Calumet River by mills located on it."⁹⁴ This "long-standing administrative construction," he tells us, is "not conclusive of course" but is entitled to "great weight."⁹⁵ However, the only stated reason he gives any weight at all to the Army Engineers' view is that by reference to it "any doubts are resolved" about the majority's reading of the statute.⁹⁶

Clearly it would be improper for a court in an enforcement proceeding to say that the prosecuting agency's view of the statute must govern simply because the agency previously has held that view and acted on it.⁹⁷ Deference on that basis would make the court merely a rubber stamp, and Douglas certainly was not taking that position. Instead he was saying that, because it supported the Court's own reading of the statute, the administrative view should be considered. There is, of course, no way to know what, if anything, he might have said about the agency's previous views had they been contrary to his.

The most striking aspect of this opinion is Douglas's injection of environmental values into statutory interpretation. He wrote,

92. *Id.* at 493 (Harlan, J., dissenting).

93. For example, in discussing one part of the statute, he says, "Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage.'" *Id.* at 490. Although not much can be read into this short statement, judicial practice now probably would emphasize what the words meant to Congress, not "to us."

94. *Id.* at 490 n.5.

95. *Id.* The Army Corps of Engineers, Douglas says, had taken this view since 1909 through a series of notices and consent decrees requiring various steel companies to take corrective action for discharges of industrial solids. *Id.*

96. *Id.* at 490.

97. Cf. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 496 (1996) (evaluating the "prosecutorial overreaching" and "institutional self-dealing" objection, described as "[h]ow can it be fair to permit the law-enforcer to say what the law is?").

We read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes in *New Jersey v. New York*, 283 U.S. 336, 342, that “A river is more than an amenity, it is a treasure,” forbids a narrow, cramped reading [of the statutory sections at issue].

Congress has legislated and made its purpose clear; it has provided enough federal law . . . from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.⁹⁸

It is difficult, even now, to understand Congress’s navigable waterways legislation from the 1890s as having a “great design” encompassing the prevention of modern water pollution problems. Justice Harlan’s dissent forcefully expressed the difficulty:

What has happened here is clear. In order to reach what it considers a just result the Court, in the name of “charitably” construing the Act, has felt justified in reading into the statute things that actually are not there. However appealing the attempt to make this old piece of legislation fit modern-day conditions may be, such a course is not a permissible one for a court of law, whose function it is to take a statute as it finds it. The filling of deficiencies in the statute, so that the burdens of maintaining the integrity of our great navigable rivers and harbors may be fairly allocated between those using them and the Government, is a matter for Congress, not for this Court.⁹⁹

In contrast, Douglas was prepared to assume that the federal courts have power to interpret liberally the purposes of an environmental statute, to fill the statutory deficiencies, and to fashion remedies—an injunction in this instance—“even though they rest on inferences.”¹⁰⁰ Fortifying his readiness to do so was his embrace of the statute in this case as a weapon in the fight to preserve the “treasure” of the nation’s rivers.

In the second of Douglas’s Rivers and Harbors Act decisions, *United States v. Standard Oil Co.*,¹⁰¹ his assertion of judicial power is even stronger. This time the government sought criminal enforcement of section 13, which bars the deposit of “any refuse matter of any kind or description” in navigable waters.¹⁰² The defendant had discharged aviation gasoline into the St. Johns River in Florida, apparently by accident.¹⁰³ Reversing a lower court finding, the Supreme Court held that “refuse matter” included this commercially valuable material and was not just restricted to waste materials.¹⁰⁴

98. *Republic Steel Corp.*, 362 U.S. at 491-92.

99. *Id.* at 510 (Harlan, J., dissenting).

100. *Id.* at 492.

101. 384 U.S. 224 (1966).

102. *Id.* at 224-25 (citing 33 U.S.C. § 407 (1964)).

103. *Id.* at 225.

104. *Id.* at 229-30.

In reaching this decision, Douglas relied on his conclusion in *Republic Steel* that "the history of this provision and of related legislation dealing with our free-flowing rivers 'forbids a narrow, cramped reading' of § 13."¹⁰⁵ As in that case, he again found support for his conclusion in the legislative history and in precedent, including a Second Circuit opinion by Learned Hand.¹⁰⁶

Most striking, however, is Douglas's explicit addition of another element to the process of statutory interpretation. At the outset of the analysis, he says,

This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history.¹⁰⁷

The pollution crisis, he seems to be saying, warrants the inclusion of common sense—some sort of independent appraisal of the soundness of various outcomes—as one of the tools to be applied to the judicial task.

At the end of his opinion, having covered the conventional bases—legislative history, precedent, and some related, albeit questionable, agency views¹⁰⁸—he comes back to "common sense" and invokes Holmes on rivers once more:

There is nothing more deserving of the label "refuse" than oil spilled into a river.

That seems to us to be the common sense of the matter. The word "refuse" includes all foreign substances and pollutants apart from those "flowing from streets and sewers and passing therefrom in a liquid state" into the watercourse.

105. *Id.* at 226.

106. *Id.* at 225-31.

107. *Id.* at 225.

108. Unlike the venerable position the Army Engineers had been acting on for decades in the earlier case, the "administrative construction" Douglas relies on in *Standard Oil* was evidenced merely by the Solicitor General's having advised the Court—presumably in briefing or oral argument—that this view of oil discharges "is the basis of prosecution in approximately one-third of the oil pollution cases reported to the Department of Justice by the Office of the Chief of Engineers." *Id.* at 226. As noted above, judicial deference to the prosecutor's own interpretation of the law risks making the court a rubber stamp and therefore is not, in and of itself, the type of prior agency view that warrants deference. In any event, the invocation of the prosecutor's practice by Douglas probably is best seen as the addition of a make-weight to bolster the Court's own conclusion, rather than any sort of real deference to the agency.

That reading of § 13 is in keeping with the teaching of Mr. Justice Holmes that a “river is more than an amenity, it is a treasure.”¹⁰⁹

There can be little doubt about Douglas’s view of the power of courts to construe Congress’s environmental statutes with explicit awareness of, and responsiveness to, the environmental problems facing the country.

Once again, a strong dissent by Justice Harlan posed the critical question about the proper judicial role in an environmental enforcement case:

Had the majority in judging this case been content to confine itself to applying relevant rules of law and to leave policies affecting the proper conservation of the Nation’s rivers to be dealt with by the Congress, I think that today’s decision in this criminal case would have eventuated differently.

... It is of course true, as the Court observes, that “oil is oil,” and that the accidental spillage of valuable oil may have substantially the same “deleterious effect on waterways” as the wholesale depositing of waste oil. But the relevant inquiry is not the admittedly important concerns of pollution control, but Congress’ purpose in enacting this anti-obstruction Act, and that appears quite plainly to be a desire to halt through the imposition of criminal penalties the depositing of obstructing refuse in rivers and harbors.

To conclude that this attempted prosecution cannot stand is not to be oblivious to the importance of preserving the beauties and utility of the country’s rivers. It is simply to take the statute as we find it.¹¹⁰

This 1966 exchange between Harlan and Douglas juxtaposes the choices that Stevens would face in environmental enforcement cases on the Seventh Circuit and the Supreme Court. Would he follow Douglas’s lead and read the statutes in light of his own appraisal of environmental threats, bolstered by “common sense”? Or would he, as Harlan urged, strive to restrict his interpretation of statutory meaning to Congress’s understanding alone? Additionally, what weight would he give to the prior views and practices of agencies seeking his direct enforcement of environmental statutes?

2. *United States v. Ewig Bros., Inc.* (1974)—Opinion by Judge Stevens

The statute the government sought to enforce in *United States v. Ewig Bros., Inc.*¹¹¹ was the Food, Drug and Cosmetic Act. The requested relief was an injunction against the distribution of smoked fish—chubs—contaminated with residues of the pesticides DDT and dieldrin. Judge Stevens’s opinion held that the relief was warranted. Given the Act’s focus on food safety, the opinion might be understood as simply resolving a statutory ambiguity in that realm, i.e., whether the statutory definition of

109. *Standard Oil Co.*, 384 U.S. at 229-30.

110. *Id.* at 230, 233-34, 237 (Harlan, J., dissenting) (citations omitted).

111. 502 F.2d 715 (7th Cir. 1974).

"food additive" was broad enough to include pesticide chemical residues found in processed fish.

Stevens recognized, however, that the residues in the fish came from DDT's "presence in the environment," and he acknowledged the broad environmental significance of the case:

Narrowly, the issue is whether residues of DDT and dieldrin in smoked chubs are "food additives" within the meaning of § 201(s) of the Federal Food, Drug, and Cosmetic Act. A somewhat more disturbing way to state the same question is whether all of the fish in the Great Lakes are "adulterated" as a matter of statutory definition.¹¹²

His opinion recognized that, despite declining levels of DDT contamination in the environment, "we must assume that the chemical, or its derivatives, will survive as an ingredient of all or most foods for some time."¹¹³ He also noted that "[s]cientists seem to agree" there is uncertainty regarding "[d]anger levels" of DDT in food.¹¹⁴ As for consumption of the specific type of fish in this case, he said, "At the levels disclosed by the record before us, the effect on human health is somewhat uncertain."¹¹⁵

Cognizant of this scientific uncertainty and the case's broader significance, Stevens closely analyzed the language and purposes of the statutory provisions as they had evolved through congressional amendments of the Act over a few decades. He found that Congress had consistently designed the statutory provisions both to reduce the need for the government in each case to "prove actual danger to a quantity of food" and to avoid "the difficulties present when dangerous substances could not be proscribed by per se rules."¹¹⁶ Because of the "broad language" Congress used, he concluded that the court "should not construe it narrowly."¹¹⁷ Implicit in his analysis is the premise that the Act does not clearly declare how it applies to the facts of this case.

Like Douglas in the Rivers and Harbors Act cases, Stevens displayed no doubt about the court's responsibility to ascertain the meaning of the statute as it applied to the facts at hand. In contrast with Douglas, however, Stevens makes hardly any references to environmental or health values beyond those expressed by Congress, nor does he purport to rely on "common sense." Instead, his discussion remains explicitly linked to congressional language and purposes throughout. At the end, summarizing the bases for his conclusion on the statute's meaning, he says that it is "evident from the entire statutory scheme, the definitional language, and the relevant legislative history."¹¹⁸ Nothing more. He notes that "it may seem odd to place the label 'additive' on a chemical substance which was a

112. *Id.* at 717.

113. *Id.* at 718.

114. *Id.*

115. *Id.*

116. *Id.* at 721.

117. *Id.*

118. *Id.* at 723.

component of the raw product.”¹¹⁹ Nonetheless, he finds this reading of the statute consistent with Congress’s intent.

He also recognizes that this reading will entitle the government to injunctive relief against adulterated fish whenever the additive is shown to be present and “without any proof that it is actually unfit as food.”¹²⁰ In contrast, under the defendant’s view of the statute, Stevens says, “adulteration of processed fish would be determined on an uncertain case-by-case basis.”¹²¹ The problem Stevens sees, and wishes to avoid, would arise if the government’s only avenue of redress for DDT contamination of processed fish were a court proceeding in which “the government would have the burden of proving that the fish are actually harmful to man.”¹²² Stevens’s conclusion that the “food additive” definition applies to DDT in processed fish instead allows for much more straightforward proceedings for direct judicial enforcement. The government only would have to prove the presence of the additive, but not how dangerous it is under the particular circumstances.

Underlying Stevens’s analysis is his conviction that judges are neither policy makers nor technical experts, and that different judges do not always reach consistent conclusions. He accepts the government’s supplementary argument that “the allocation of decision-making responsibility between the agency and the judiciary justifies” the application of the food additive definition.¹²³ He explains,

For if, as the government contends, DDT is a food additive, the Food and Drug Administration may itself decide when products containing quantities of DDT should be removed from public consumption, without having to rely upon the decisions—possibly inconsistent with one another—of different federal judges determining danger to health under [various statutory sections] on a case-by-case basis.¹²⁴

Stevens thus posits a limited function for judges in environmental enforcement cases, especially when they raise technical questions of public health and environmental quality, and when there is scientific uncertainty about what is safe and what is dangerous.¹²⁵

119. *Id.* at 722.

120. *Id.*

121. *Id.*

122. *Id.* at 719.

123. *Id.*

124. *Id.*

125. Stevens approvingly quotes in this regard an emphatic statement by the Seventh Circuit in an earlier food safety case:

[T]his court is acutely aware of the fact that it is not the proper body to more narrowly define broad standards in this area so that they can be applied in a particular case. Courts know neither what is necessary for the health of the consuming public nor what can reasonably be expected from the . . . industry. . . . The Food and Drug Administration should set definite standards in each industry which, if reasonable, and in line with expressed Congressional intent, would have the force of law.

United States v. 1,500 Cases More or Less, Tomato Paste, 236 F.2d 208, 211 (7th Cir. 1956).

3. *Adamo Wrecking Company v. United States* (1978)—Dissenting Opinion by Justice Stevens and *Tennessee Valley Authority v. Hill* (1978)—Opinion by Chief Justice Burger

Since his service on the Supreme Court began, Stevens has not written the Court's opinion in any of the direct environmental enforcement cases it has decided.¹²⁶ However, he has filed concurrences or dissents in some of them, illuminating his thinking about the judicial role, and its relationship to legislative and administrative powers, in this type of litigation. One early opinion apparently of this sort was his dissent in *Adamo Wrecking Co. v. United States*,¹²⁷ a criminal prosecution under the Clean Air Act. The defendant was accused of violating the EPA's "emission standards" for asbestos. Those regulations required that before buildings containing asbestos insulation and fireproofing could be demolished, they had to be watered down. Stevens disagreed with the majority's conclusion that this work-practice standard was not an emission standard and thus was beyond the EPA's authority under the Act.

At the outset of his dissent, Stevens emphasized that Congress attached criminal liability to violations of emission standards for hazardous air pollutants because, in the Justice's words, "substances within that narrow category pose an especially grave threat to human health."¹²⁸ He then linked that threat to the Court's task: "That is also a reason why the Court should avoid a construction of the statute that would deny the Administrator the authority to regulate these poisonous substances effectively."¹²⁹ On the one hand, this statement, not unexpectedly, illustrates Stevens's readiness to interpret the Clean Air Act in light of the environmental dangers it obviously addresses.¹³⁰ On the other hand, he limits the Court's role in this case by focusing on the legality of the EPA Administrator's statutory view. Although it may be unusual in a criminal enforcement proceeding to focus

126. Stevens wrote the majority opinion in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), which might arguably fall within this category. The case was a cleanup cost recovery action filed by a potentially responsible party against other such parties under the Comprehensive Environmental Response, Compensation, and Liability Act. Because the issues addressed in Stevens's opinion only relate to the recovery of attorney's fees, the decision only peripherally speaks to the types of concerns under discussion here and therefore is not included. Additionally, in considering one of the plaintiff's arguments, Stevens wrote, "[W]e believe it would stretch the plain terms of the phrase 'enforcement activities' too far to construe it as encompassing the kind of private cost recovery action at issue in this case." *Id.* at 819.

127. 434 U.S. 275, 293 (1978) (Stevens, J., dissenting).

128. *Id.*

129. *Id.*

130. One commentator on Stevens's opinion observed, "It was an air quality decision . . . from which he dissented on the ground that the unique characteristics of asbestos as a pollutant justify a unique regulation." Robert J. Sickels, John Paul Stevens and the Constitution: The Search for Balance 12 (1988); cf. William H. Rodgers, Jr., *Environmental Law* 195 (2d ed. 1994). Rodgers states, "Unique disdain among environmental groups is reserved for *Adamo Wrecking* that attaches an implausible and functionally narrow reading to 'emission standard', demonstrating in the process of decision the chameleon-like character of the deference rule and the flinty-eyed use of legislative history." *Id.*

on the statutory propriety of an administrative regulation, the majority had concluded that the challenge in this instance was allowable as a defense, and Stevens did not disagree with that conclusion.

After that step was taken, this enforcement case became a hybrid: an exercise in judicial review of an agency regulation in the context of a criminal enforcement case. Indeed, Stevens's conclusion that the regulation is within the statutory purview is expressed in language that anticipates his *Chevron* ruling:

The precise question presented to this Court is not whether, as an initial matter, we would regard the asbestos regulation as an "emission standard" within the meaning of § 112. Rather, the issue is whether the Administrator's answer to the question of statutory construction is "sufficiently reasonable that it should have been accepted by the reviewing courts."

... Because the statute is the Administrator's special province, we should not lightly set aside his judgment. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'"¹³¹

The dissent thus expresses Stevens's view of the deferential role courts should play when reviewing environmental regulations, rather than his view of the judicial role when a legal question has "arisen in the first instance in the judicial proceedings." This opinion does not tell us how he would approach statutory interpretation in the latter context, and more particularly when faced with a request for direct judicial enforcement of an environmental statute.

A few months after *Adamo Wrecking*, however, the Supreme Court decided one of its best known environmental cases, *Tennessee Valley Authority v. Hill*.¹³² Stevens joined in Chief Justice Burger's opinion affirming the issuance of an injunction to limit further activities by the Tennessee Valley Authority ("TVA") relating to the nearly completed Tellico Dam on the Little Tennessee River. The case was brought under the citizen suit provision of the Endangered Species Act, and the injunction would prevent TVA activities "which may destroy or modify the critical habitat of the snail darter," a species of fish that had been listed as an endangered species pursuant to the Act.¹³³

In this direct enforcement action, the Court's function, as explained by the Chief Justice for the majority, was not to review the agency regulations

131. *Adamo Wrecking Co.*, 434 U.S. at 300-01 (quoting *Train v. Natural Res. Def. Council*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1, 16 (1964)).

132. 437 U.S. 153 (1978).

133. *Id.* at 168.

declaring the snail darter an endangered species.¹³⁴ Instead, the Court was to interpret and apply the language of the Endangered Species Act in order to determine whether the TVA had violated it. Burger's opinion emphatically and repeatedly declared the Act to be as clear as statutes can be and, therefore, found the Court compelled to issue the injunction, despite tremendous countervailing economic considerations. He wrote,

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. . . . This language admits of no exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed the Endangered Species Act of 1973. To sustain that position, however, we would be forced to ignore the ordinary meaning of plain language. . . .

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities. . . .

. . . .

The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. . . .

. . . .

One might dispute the applica[tion] . . . to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of the endangered species as "incalculable"

. . . .

We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities Our individual appraisal of the wisdom or unwisdom of a

134. See *id.* at 172 ("Indeed, no judicial review of the Secretary's determinations has ever been sought and hence the validity of his actions are not open to review in this Court.").

particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.¹³⁵

In these statements, Burger bent over backwards to make the point that it was not the Court's own policy conclusions that drove the result, but the unambiguous intent of Congress.¹³⁶ This perspective certainly was one with which Stevens was more than comfortable, as he allied with Burger's reading that the "plain language" of the Act mandated the result.

There are two aspects of the case that differentiated it from *Adamo Wrecking* and must have bolstered Stevens's readiness to issue the injunction. In *Hill*, the Endangered Species Act was found to be unambiguous, and there was no previous agency interpretation of the question before the Court. In *Adamo Wrecking*, the Clean Air Act was ambiguous, but there was a prior agency regulation interpreting it. The two cases thus present two significantly different scenarios within the direct enforcement category.

In *Hill*, Stevens endorsed Burger's explicit rejection of judicial policy making or "balancing" in the face of a statute whose intent is plain. A week after the decision was issued, Stevens privately observed,

[S]hould we not be giving more thought to *who* the decision-maker in this [environmental] area should be. There is often an unstated assumption that judges will be making more and more of these decisions. I am inclined to think, however, that the kind of policy choices that are inevitably involved can usually be handled more effectively by a legislative, executive, or administrative body. A central point of the Chief Justice's fine opinion in the snail darter case was that the underlying issue was not one that we should decide.¹³⁷

135. *Id.* at 173-74, 184, 187, 194.

136. Burger's initial inclination to deny the injunction, as revealed in the papers of Justice Blackmun, and Burger's intimation in a footnote, *id.* at 159 n.7, that the snail darter was not a very important species, are discussed at Holly Doremus, *The Story of TVA v. Hill: A Narrow Escape for a Broad Law*, in *Environmental Law Stories* 109, 126-31 (Richard J. Lazarus et al. eds., 2005). See also Oliver Houck, *Unfinished Stories*, 73 U. Colo. L. Rev. 867, 935 (2002) (citing Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,606, 10,611 (1993)); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,637, 10,642-43 (Oct. 2005).

137. Letter from Justice John Paul Stevens to Kenneth A. Manaster (June 23, 1978) (on file with author); see also Doremus, *supra* note 136, at 27. Doremus quotes the following portion of Stevens's draft dissent from a possible summary reversal of the lower court's injunction earlier in the year:

Perhaps it is somewhat odd for Congress to place such a high value on the preservation of the snail darter. But it is even more odd for this Court to place a higher value on the investment in the Tellico Dam and Reservoir Project than on the proper allocation of decisional responsibility in the structure of our Government. For this Court to place its stamp of approval on proposed executive actions that will admittedly violate a federal statute is . . . lawless.

Id. As Stevens would demonstrate in other cases, he would consider it equally "odd," and equally wrong, for himself and the Court to place a higher value on environmental protection than on the proper allocation of decisional responsibility.

Stevens agreed that a definite policy choice had been made by Congress in the Endangered Species Act. The Court's only task was to enforce that choice.

In contrast, in *Adamo Wrecking* the Court faced an ambiguous statute coupled with a pertinent agency interpretation promulgated for reasons other than specific enforcement proceedings.¹³⁸ In that context, Stevens saw strong grounds for deferring to a reasonable agency construction of the legislation. He would later elaborate on those grounds in *Chevron*.

4. *City of Chicago v. Environmental Defense Fund* (1994)—Dissenting Opinion by Justice Stevens

In this citizen suit under the Resource Conservation and Recovery Act ("RCRA"), the majority concluded that ash generated by Chicago's incineration of municipal solid waste was subject to RCRA requirements applicable to hazardous waste streams.¹³⁹ Stevens disagreed, finding that when Congress amended RCRA to clarify a statutory exclusion for household waste, it intended to apply that exclusion to the ash resulting from incineration of that type of waste in a resource recovery facility such as Chicago's.

Once again, Stevens carefully dissected the statutory language and legislative history. In this instance, he also read the statutory amendment in light of an earlier EPA regulation that the amendment was designed to clarify. He explored these sources, of course, because the statute was ambiguous. He observed, "The relevant statutory text is not as unambiguous as the Court asserts."¹⁴⁰ He also relied on accepted canons of statutory construction, as when he noted that his view "effectuates the narrower and more recently enacted provision [the amendment] rather than the earlier more general definition [from RCRA in its original enactment]."¹⁴¹

As in *Adamo Wrecking*, Stevens counted as an important factor in his reading of the statute the position of the administrative agency to which Congress had delegated "vast regulatory authority over the mountains of garbage that our society generates."¹⁴² As the last of the "several reasons" supporting his statutory interpretation, Stevens said, "Finally, it is the construction that the EPA has adopted and that reasonable jurists have accepted."¹⁴³

More clearly than in any other opinion of his in an environmental case, Stevens emphasized that his conclusion was based on his best

138. As noted, *supra* text accompanying notes 96, 107, deference to the prosecution's view as such is unwarranted. Only if the view has been previously adopted for some other purpose within the agency's responsibilities should deference be appropriate.

139. *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328 (1994).

140. *Id.* at 346 (Stevens, J., dissenting.)

141. *Id.* at 347.

142. *Id.* at 340.

143. *Id.* at 348.

understanding of the statute's purpose, rather than his own policy views. He recognized that the majority's view meant that the incinerator ash would be regulated as hazardous waste, while under his view it would be omitted from those regulatory protections. He wrote, "The majority's decision today may represent sound policy. Requiring cities to spend the necessary funds to dispose of their incinerator residues in accordance with the strict requirements of Subtitle C will provide additional protections to the environment."¹⁴⁴

He qualified this concession a bit, noting that there were other, competing environmental considerations such as "the conservation of scarce landfill space and the encouragement of the recovery of energy and valuable materials in municipal wastes."¹⁴⁵ Nonetheless, he continued,

Whether those purposes will be disserved by regulating municipal incinerators . . . and, if so, whether environmental benefits may nevertheless justify the costs of such additional regulation are questions of policy that we are not competent to resolve. Those questions are precisely the kind that Congress has directed the EPA to answer. The EPA's position . . . was and remains a correct and permissible interpretation of the EPA's broad congressional mandate.¹⁴⁶

Once again, Stevens insisted that judges are neither policy makers nor technical experts, and that courts must be deferential when Congress has chosen to give an administrative agency the authority to fill gaps in an ambiguous statute. Once again, as suggested by his views in *Tennessee Valley Authority v. Hill*, he remained committed to placing a higher value "on the proper allocation of decisional responsibility in the structure of our Government" than on specific, pressing economic or environmental concerns.¹⁴⁷

Recently Stevens spoke about a number of cases in which he found a contradiction between the result required by proper performance of his limited judicial role and the result he would have favored if the policy choice were up to him—in his words, "if I were a legislator."¹⁴⁸ Although he did not mention *City of Chicago*, he might well have included it as another instance in which, as he said, "my opinion of what the law authorized is entirely divorced from my judgment concerning the wisdom of the program" and in which he "was unhappy about the consequences of an opinion that I authored."¹⁴⁹ In comments such as these, the position of

144. *Id.*

145. *Id.*

146. *Id.* at 348-49.

147. *See supra* note 137.

148. Justice John Paul Stevens, Judicial Predilections, Address to the Clark County Bar Association 2 (Aug. 18, 2005) (transcript on file with author).

149. *Id.* at 7, 11. During the confirmation process on his Supreme Court nomination, Stevens wrote quite similarly,

There have been occasions during my work on the Court of Appeals when I have decided cases contrary to my own views as to what would be most advantageous or desirable in our modern day society. A judge must do so if he is to be faithful to

Justice Harlan in the earlier environmental enforcement cases is echoed: "It is simply to take the statute as we find it."¹⁵⁰

5. *Steel Company v. Citizens for a Better Environment* (1998)—Concurring Opinion by Justice Stevens

Neither Stevens's dissent in *Adamo Wrecking*, his support of *Tennessee Valley Authority v. Hill*, nor his dissent in *City of Chicago* tells us how he would view the judicial role in a direct enforcement case in which the statute is ambiguous but there is no prior agency interpretation. That essentially describes the Seventh Circuit *Ewig Bros.* case, and it also is the context of *Steel Co. v. Citizens for a Better Environment*.¹⁵¹

Once again the Court faced a citizen suit under an environmental statute, the Emergency Planning and Community Right-to-Know Act ("EPCRA"). The citizens group claimed that Steel Company had not filed the required reports on its hazardous materials usage and storage. Because the company later filed these reports before suit was filed, the Supreme Court faced a question it had previously encountered, namely, whether a statute such as this authorizes suit for violations entirely in the past. The majority declined to rest the result in *Steel Co.* on that ground, however, instead concluding that the case must be dismissed because plaintiff failed to meet basic constitutional criteria for standing to sue.

Stevens sharply disagreed that the matter should be resolved on the standing issue. Rather than address that constitutional question, his view was that resolution of the statutory scope of EPCRA would be a necessary and sufficient discharge of the judicial function. Turning to that task, he observed that "the language of the citizen-suit provision is ambiguous."¹⁵² Accordingly, searching for congressional intent on the "wholly past violations" question, he delved into other sections of the Act and into the Supreme Court's precedent under another environmental statute.¹⁵³ There was, of course, no prior agency view on this question, which so plainly pertains to access to judicial redress, rather than to matters of agency expertise.¹⁵⁴ Stevens reiterated his concern about avoiding unnecessary

his office. I will continue to follow the law even when it does not accord with my own ideas about sound policy.

Letter from John Paul Stevens to Senator James O. Eastland (Dec. 8, 1975), in *Hearings on Nomination of John Paul Stevens, of Illinois, to be an Associate Justice of the Supreme Court of the United States, Before the U.S. Senate Comm. on the Judiciary*, 94th Cong. 8 (1975).

150. *United States v. Standard Oil Co.*, 384 U.S. 224, 237 (1966).

151. 523 U.S. 83 (1998).

152. *Id.* at 132 (Stevens, J., concurring).

153. *Id.* at 132-33 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987)).

154. *Cf. Kelley v. Env'tl. Prot. Agency*, 15 F.3d 1100, 1108 (D.C. Cir. 1994). In that case, the court rejected EPA regulations clarifying the liability of secured lenders under the Comprehensive Environmental Response, Compensation and Liability Act. The court stated,

decisions on constitutional questions. He invoked the Court's "settled policy of adopting acceptable constructions of statutory provisions in order to avoid the unnecessary adjudication of constitutional questions."¹⁵⁵ In this instance, that policy, he said, "strongly supports a construction of the statute that does not authorize suits for wholly past violations."¹⁵⁶

Stevens thus takes a multifactored approach to the task of interpreting this ambiguous statute. He does not have the luxury, as he did in *Tennessee Valley Authority v. Hill*, of being able to find the statutory meaning plain and unambiguous. Instead, as in *Ewig Bros.*, he looks not just to the ambiguous statutory language at issue, but to the "entire statutory scheme" to help derive the legislative intent. He finds further support for his reading of EPCRA in judicial precedent construing the similar Clean Water Act citizen suit provision. Lastly, he gives weight to the policy of avoiding constitutional questions if an "acceptable" statutory construction is available. These four factors—statutory language, statutory structure, judicial precedent, and the preferential policy of resolving statutory rather than constitutional questions—are the tools he brings to bear in this enforcement case.

As his other opinions demonstrate, sometimes there are other tools available as well, though he apparently did not find these apt in *Steel Co.* In the *Ewig Bros.* decision, and his dissent in *City of Chicago*, he relied extensively on legislative history, and in the latter he also alluded to canons of statutory construction. *Ewig Bros.* also factored in practical considerations bearing on the effectiveness of enforcement of the statutory program. In that case, as earlier noted, he accepted a statutory interpretation that would facilitate consistent enforcement, rather than inviting inconsistent, case-by-case determinations by different federal judges.¹⁵⁷ Lastly, of course, he has given considerable weight to prior

[T]he same reason that prevents the agency from issuing the rule as a substantive regulation precludes judicial deference to EPA's offered "interpretation." If Congress meant the judiciary, not EPA, to determine liability issues—and we believe Congress did—EPA's view of statutory liability may not be given deference Where Congress does not give an agency authority to determine . . . the interpretation of a statute in the first instance and instead gives the agency authority only to bring the question to a federal court as the "prosecutor," deference to the agency's interpretation is inappropriate. . . . Moreover, even if an agency enjoys authority to determine such a legal issue administratively, deference is withheld if a private party can bring the issue independently to federal court under a private right of action.

Id.; see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2713 (2005) (Breyer, J., concurring) ("Congress may have intended *not* to leave the matter of a particular interpretation up to the agency . . . , say, where an unusually basic legal question is at issue.").

155. *Steel Co.*, 523 U.S. at 133.

156. *Id.*

157. *United States v. Ewig Bros., Inc.*, 502 F.2d 715, 719, 722 (7th Cir. 1974).

agency interpretations that help to fill in blanks in statutory meaning. He took this approach in *Adamo Wrecking* and in *City of Chicago*.¹⁵⁸

What is explicitly absent among these factors is Stevens's own appraisal of the environmental wisdom of one result or another in any of these cases.¹⁵⁹ As he makes clear in *City of Chicago*, and has consistently stated throughout his judicial career, a judge is not to act as a legislator. In *Ewig Bros.*, he emphasized the "allocation of decision-making responsibility between the agency and the judiciary."¹⁶⁰ In his draft dissent in the early stages of *Tennessee Valley Authority v. Hill*, he stressed the judiciary's responsibility to recognize the paramount significance of "the proper allocation of decisional responsibility in the structure of our Government."¹⁶¹ With this value in the forefront, Stevens has declined to rest his opinions in environmental cases on his own appraisal of environmental perils or his own "common sense."¹⁶² He has declined to follow the path of his predecessor.

The question of a possible middle ground, however, still remains. Although Douglas perhaps was prepared to read the judicial role more broadly than a proper respect for our governmental structure warrants, has Stevens perhaps gone too far in the other direction? The *Chevron* decision, his leading opinion in the next category of environmental cases, suggests an answer.

158. The *Ewig Bros.* case included an agency's unusual attempt to persuade the court to ignore the agency's own prior interpretation of its authority. A subsidiary issue in the case was the weight to be given to "interim enforcement guidelines" issued by the Food and Drug Administration and specifying the concentration limits for DDT in fish that would be treated as violations of the statute. *Id.* at 724. The agency did not wish to be bound by its own guidelines and stressed that it had issued them voluntarily rather than under any statutory mandate. *Id.* Judge Stevens held that the agency could not disregard its own promulgation and had "assumed the burden of proving that [defendant] violated the specified limits." *Id.* at 725. Perhaps this result should be understood as illustrating Stevens's unyielding respect—despite the agency's readiness to yield—for the proper "allocation of decision-making responsibility between the agency and the judiciary" in a regulatory scheme focused on technical matters such as food safety and environmental health. *Id.* at 719. Stevens did ultimately conclude, however, that the government "met its burden of proving repeated violations" of the statute as implemented by the guidelines. *Id.* at 725-26.

159. A complementary discussion of Stevens's approach to statutory interpretation, though focusing largely on opinions other than those discussed here, can be found in Hughes, *supra* note 7.

160. *Ewig Bros., Inc.*, 502 F.2d at 719.

161. See *supra* notes 137, 158.

162. Although Stevens has written favorably of a canon of statutory construction that "requires judges to use a little common sense," he seems to construe the canon as aimed at avoidance of "absurd" outcomes that it is unreasonable to believe the legislature intended. His allusions to "common sense" are thus considerably narrower in scope than Justice Douglas's and do not contradict Stevens's oft stated aversion to judicial policy making. John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. Pa. L. Rev. 1373, 1383-85 (1992).

*C. Review of Agency Action**1. Stearns Electric Paste Company v. Environmental Protection Agency (1972)—Opinion by Judge Stevens*

In environmental cases involving judicial review of administrative agency action, Stevens is best known for the deferential approach to agencies set forth in *Chevron*.¹⁶³ Ironically, however, his first opinion in this type of case held that an agency overstepped the authority Congress had delegated to it and so the agency's position should be invalidated. The case, *Stearns Electric Paste Co. v. Environmental Protection Agency*,¹⁶⁴ was a petition for review of an EPA adjudicatory order canceling the registration of petitioner's product, a phosphorous paste rodenticide, or rat poison.

The proceeding arose under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), a statute focused on both the efficacy and safety of economic poisons. The EPA had concluded that the rat poison was "misbranded," and therefore not entitled to continued government approval for household use. The EPA's view was that the product posed dangers in household settings, not when used in compliance with the manufacturer's directions and labels, but when subjected to "willful misuse (in the case of suicide ingestions), wanton recklessness, or at least negligent behavior."¹⁶⁵

After analyzing the language, history, and purposes of FIFRA, Stevens concluded that "there is no statutory support for the application of [the statute's safety] standard to misuse of a product."¹⁶⁶ He continued, "Without such support, the formulation of substantive standards of product safety by an administrative agency expands the scope of administrative discretion beyond permissible limits."¹⁶⁷ He acknowledged the temptation to support agency responses to "dramatic but unfortunate tragedies" such as a child's violent death by poisoning.¹⁶⁸ Nonetheless, he emphasized that judicial appraisal of such responses must be done "as dispassionately as possible," given the allocation of policy responsibility in our governmental system. He explained,

Whether [such tragedies] justify a particular prohibition involves a policy choice which, under our scheme of government, must be made by a legislature or by an agency to which the legislature has delegated the

163. In this category of environmental case, it is not unusual for questions of standing to arise with regard to the ability of a citizen plaintiff to obtain judicial redress. These questions are often seen as touching on aspects of the judicial function similar to those under discussion here. Because standing doctrine also raises a host of separate concerns, however, including constitutional considerations, it will not be explored here.

164. 461 F.2d 293 (7th Cir. 1972).

165. *Id.* at 308.

166. *Id.* at 307.

167. *Id.*

168. *Id.* at 308.

responsibility for making principled decisions in accordance with its basic statement of policy. The fact that a legislature may react slowly to obvious dangers, such as the holocaust on our highways, the creeping infection of our environment, and the consumption of deleterious substances in the home, cannot justify an agency's policy determinations that are not authorized by statute. . . .

....

It is not our function, however, to articulate in the first instance the standards which may support a finding of misbranding based primarily on evidence of misuse. . . .

....

. . . Nor, of course, do we express any opinion on the policy issue of whether phosphorous paste should be banned from the home environment regardless of whether or not the products are misbranded within the meaning of FIFRA.¹⁶⁹

In these statements, Stevens expressed for the first time in an environmental case the theme that would dominate his later opinions in review of agency action—the paramount significance of our governmental structure which creates the legislature's primary role in making policy choices, the agencies' secondary role in exercising delegated responsibility to implement legislative policy, and the judiciary's nonexistent policy role. As noted earlier with regard to enforcement cases, Stevens has emphasized this theme in that category as well.¹⁷⁰ Nonetheless, *Stearns* also exemplifies Stevens's willingness to apply judicial power in support of the legislative function whenever necessary in order to restrain an overzealous, albeit well-intentioned, agency from going "beyond the authority which Congress has delegated to the agency."¹⁷¹

It might be thought that, after starting with this perspective, Stevens later altered his views by the time he wrote *Chevron*. Perhaps by then he would have decided a case like *Stearns* differently and would have deferentially accepted the agency view as being within the bounds of the statute. Given the firmness of his conclusion in *Stearns*, however, that notion is unpersuasive. Furthermore, it has long been recognized that even a deferential approach to review of agency action does not preordain every outcome.

169. *Id.* at 308-11.

170. See *supra* text accompanying note 124, 158 (regarding *Ewig Bros.*); *supra* text accompanying note 147 (regarding *Hill*); *supra* text accompanying note 162 (regarding *City of Chicago*).

171. *Stearns Elec. Paste Co.*, 461 F.2d at 311. In a companion case raising similar questions under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and the Food, Drug and Cosmetic Act, Stevens similarly rejected a statutory construction by the EPA "which is not required by the language or purpose of either statute." *Cont'l Chemiste Corp. v. Ruckelshaus*, 461 F.2d 331, 341-42 (7th Cir. 1972).

In this regard, the observations of Professor Nathaniel Nathanson over fifty years ago are instructive:

Of course, it requires no great sophistication to suspect that the rational-basis rule of statutory interpretation is not really likely to impede a court in substituting its own judgment for that of an administrator when it is satisfied that the administrative judgment is wrong. . . .

[I]t may be of some comfort to note that even those Justices who have been most insistent upon the rational-basis rule have never been at a loss for methods of correction when the Administrator has, in their view, strayed from the path of reason or beyond the bounds of his authority.¹⁷²

Nathanson was one of Stevens's law school professors at Northwestern University. Stevens studied constitutional law and administrative law under him, and Nathanson's views in those realms had considerable influence on the future Justice's thinking.¹⁷³ While the professor's statements may help us understand a case such as *Stearns*, in which an agency is found to have exceeded its delegated authority, these particular observations of his do not indicate how a court should evaluate an agency's statutory interpretations that fall within the realm of discretion delegated by the legislature. Stevens did not confront that question in *Stearns*, but later spoke to it directly in *Chevron*.

2. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*
(1984)—Opinion by Justice Stevens

Justice Stevens's unanimous opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁷⁴ is widely regarded as a major statement of the ground rules governing judicial review of agency interpretations of their statutory authority. It undoubtedly is all of that, although it is difficult to find in it anything new, anything that the Court had not essentially already said. Indeed, Stevens himself did not consider his statement as new in any respect, and he explicitly relied on numerous precedents to support his synthesis of analytic steps in judicial review. In light of these precedents, and his own earlier decisions emphasizing respect for the relationships among the legislature, agencies, and courts, *Chevron* as written by Stevens should not have been a surprise.

Once again, the probable influence of Nathanson on Stevens is notable. In a lengthy 1950 article on judicial review of agency interpretation of statutes, Nathanson focused on "the rational-basis rule of statutory

172. Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 Vand. L. Rev. 470, 479, 492 (1950).

173. John Paul Stevens, *Judicial Restraint*, 22 San Diego L. Rev. 437, 439 (1985).

174. 467 U.S. 837 (1984). Although unanimous, only six Justices participated in the decision. Further explanation of the circumstances, including Justice Byron White's assignment of the opinion to Stevens, may be found at John Paul Stevens, *In Memoriam: Byron R. White*, 116 Harv. L. Rev. 1 (2002).

construction,” which he characterized as a doctrine “of somewhat more recent vintage.” This view, Nathanson wrote,

teaches that there are occasions when the reviewing court need not be persuaded that the administrative agency’s choice of conflicting interpretations is right, but only that it is reasonable—occasions when, as Chief Justice Vinson has said, “we need not find that its construction is the only reasonable one, or even that it is the one we would have reached had the question arisen in the first instance in judicial proceedings.”¹⁷⁵

Clearly this view was more than palatable to Stevens even before *Chevron*, as indicated by prior opinions such as his dissent in *Adamo Wrecking*. That dissent also quotes these words of Chief Justice Vinson.¹⁷⁶

Not only did Stevens study with Nathanson, a preeminent analyst of administrative law conundrums, but Stevens also clerked for Justice Wiley Rutledge in 1947-1948. Rutledge participated in the Court’s decision of a large number of important cases during the 1940s that made formative contributions to modern administrative law.¹⁷⁷ A few years after his clerkship, Stevens said of Rutledge, “He believed in allowing wide discretion . . . to administrative agencies—always subject, however, to review for possible abuse.”¹⁷⁸ Stevens, in short, had been exposed early on to the issues that became *Chevron*, and to sophisticated academic and judicial thinking about how to resolve them.¹⁷⁹

175. Nathanson, *supra* note 172, at 470.

176. See *supra* text accompanying note 131.

177. At least fifteen of these cases are analyzed in Nathanson, *supra* note 172. The analysis of Justice Wiley Rutledge’s concurring opinion in *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441 (1947), highlights aspects of Rutledge’s perspective on judicial review that strongly presage what Stevens would write in *Chevron* nearly forty years later. *Id.* at 477-78. Rutledge’s opinion was written about ten months before Stevens’s clerkship began. See John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* 293 (2004) (discussing Rutledge’s majority opinion in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)). Ferren states,

By addressing, comprehensively, the respective roles of agency and court, requiring judicial deference to the administrative body’s interpretation and application of the statute it was charged to administer, Rutledge reinforced . . . the jurisprudence that protected administrative agencies against judges who would substitute their own judgments for the expertise of agency administrators. While not the first statement of this approach to judicial review, Rutledge’s opinion moved the deference doctrine forward significantly.

Id.

178. John Paul Stevens, *Mr. Justice Rutledge*, in *Mr. Justice* 177, 187 (Allison Dunham et al. eds., 1956).

179. Some of Nathanson’s views are strikingly similar to Stevens’s *Chevron* opinion. For example, Nathanson wrote,

When language is ambiguous and legislative history fragmentary and inconclusive, an administrative judgment based upon a reasoned examination of the problem in the light of both the particular facts and the broad statutory objectives is likely to provide the most reliable guide to the effectuation of those objectives. If acceptance of this judgment must be reconciled with a theory of legislative intention, it might be said that the legislature presumably intended the statute to achieve its apparent objectives to the fullest extent practicable within the limits

The validation of the EPA's air pollution regulations in *Chevron* rested on the Court's dual conclusion that the Act was ambiguous and the agency had adopted a reasonable interpretation of the statute's language and purposes. Stevens wrote,

In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. . . .

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.¹⁸⁰

Stevens's explanation of these and related bases for what has come to be known as "*Chevron* deference"—his synthesis of precedents and democratic theory into a road map for the judicial task in reviewing agency positions—is clear and persuasive. Although there remains disagreement within the Court regarding possibly differential treatment of different types of agency pronouncements,¹⁸¹ fundamentally *Chevron* seems likely to endure and continue to receive widespread judicial application.

Accordingly, when regulatory actions of environmental and other types of agencies are subjected to judicial review, there is no reason to expect that Justice Stevens's emphatic rejection of a policy making role for judges will be diluted or ignored. As Stevens said, "in such a case" judges must respect "legitimate policy choices" made by the regulatory agency. The limited judicial role Stevens has always espoused in judicial review cases seems likely to be well preserved in its *Chevron* garb.

clearly defined, and that the best judges of practicability are those to whom is entrusted the primary responsibility for administration.

Nathanson, *supra* note 172, at 491.

180. *Chevron U.S.A., Inc.*, 467 U.S. at 865-66.

181. See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2713 (2005) (Scalia, J., dissenting); *Smith v. City of Jackson*, 125 S. Ct. 1536, 1546 (2005) (Scalia, J., concurring); *United States v. Mead Corp.*, 533 U.S. 218 (2001). See generally Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 Fordham L. Rev. 1877 (2006).

CONCLUSION: A *CHEVRON* COROLLARY

In some environmental enforcement cases, as discussed above,¹⁸² the court may find that there is no expression of a prior, relevant agency position. If there is, of course, then deference is appropriate as a key ingredient in statutory interpretation, as Stevens explained in enforcement cases such as *Adamo Wrecking* and *City of Chicago*. But if there is no prior agency view at hand and the statute is ambiguous, the court is, in a sense, on its own. In the choice words of Professor Nathanson, what if the court does not have that “avenue of escape from the futility of a metaphysical search for a nonexistent legislative intent?”¹⁸³

Chevron seems at first not to offer an answer, primarily because by definition—as an exercise in review of agency action—a case like *Chevron* is premised on there being an agency position to examine. Additionally, Stevens in *Chevron* and other opinions seems adamant in rejecting any infusion of judicial policy choices into the regulatory arena.

On closer examination, *Chevron* may provide an answer, particularly when Stevens’s views in both environmental enforcement cases and common law nuisance cases also are considered. *Chevron* first reminds us that, when there are gaps in statutory specifications for how legislative policy is to be carried out, the task to be performed is to fill those gaps.¹⁸⁴ When an agency has been delegated that task, *Chevron* confirms the importance of its choices in accomplishing it. When an agency has not been delegated that task, however, or perhaps has such authority but has not yet applied it to the specific matter at issue, the need for the gap to be filled has not vanished. If an enforcement proceeding has been initiated by the government, or by a citizen as a “private attorney general,” the ambiguous statute still remains in need of application.

This was the challenge Stevens confronted in the *Ewig Bros.* case and in *Steel Co.* In both of these opinions, he invoked an assortment of sources and considerations to resolve the ambiguity and determine what enforcement of the statute was warranted. What he did not allude to in those cases was the gap-filling task—the more specific policy choices needed in order to implement broader legislative policy—which he so plainly recognized in *Chevron*, and earlier in *Stearns*, as necessary in the face of statutory ambiguity. The reasons for his silence seem fairly obvious: Stevens has always abjured a conception of the judge as policy maker, or at least that is what he has said in the environmental enforcement and judicial review cases discussed here. He even has insisted that the proper characterization of what agencies do when they perform the gap-

182. See *supra* Part II.B.

183. Nathanson, *supra* note 172, at 491.

184. “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Cf. text accompanying *supra* note 99 (quoting Justice Harlan on the “filling of deficiencies in the statute”).

filling task, at least through rulemaking, is that they are exercising delegated "legislative power."¹⁸⁵ Obviously a judge should not be legislating, and Congress would not, and constitutionally should not, delegate its lawmaking responsibilities to the judicial branch.

In contrast, in the common law nuisance cases Stevens adopted a different stance. He embraced both the capability and the authority of judges to make the "flexible and creative judicial response on a case-by-case basis" that Justice Blackmun, and earlier Justice Douglas, had urged in some major environmental controversies.¹⁸⁶ Stevens recognized that judges' traditional capacities and experience included the fashioning of doctrine and remedies in the complex, and even at times quite technical, context of nuisance cases.¹⁸⁷

Do Stevens's contrasting views in these different types of environmental cases express a contradiction? Stevens's strong focus on respect for the structure of our government suggests that there is no inconsistency. Within that structure he can find a venerable and sensible role for common law nuisance power in the judiciary, even if at times it were exercised as a supplement to regulatory schemes created by legislation. Beyond that traditional role, however, he sees the judiciary as lacking any authority to make policy. That restrictive, or judicially restrained, view seems entirely adequate as an approach to judicial review in cases such as *Chevron* and in enforcement cases such as *Adamo Wrecking* and *City of Chicago*. The structure he respects is intact in those cases, for the legislature has enlisted the executive branch in the implementation of the law, to make the more specific policy choices that are needed.

What Stevens seems not to have addressed is the judicial role when there is not only a gap in the statute but a gap in the governmental structure. What is a court to do when the legislature's enactment has raised a question but not answered it and no agency action has been authorized, or yet executed, to answer it either? This is the underlying difficulty that Justices Douglas and Harlan tussled over in the two 1960s Rivers and Harbors Act enforcement cases.¹⁸⁸ Douglas's answer was to inject some of his own appraisal of environmental exigencies and "common sense," asserting that Congress "has provided enough federal law . . . from which appropriate remedies may be fashioned even though they rest on inferences."¹⁸⁹ Justice Harlan, in marked contrast, was resolute in stating that "[t]he filling of

185. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring); see also Nathanson, *supra* note 172, at 491 ("[T]he rational-basis rule of judicial review has a more distinctive function to perform in recognition of an administrative judgment which is essentially legislative or discretionary in character.").

186. *City of Milwaukee v. Illinois*, 451 U.S. 304, 339 n.8 (1981) (Blackmun, J., dissenting); see *supra* notes 72-73.

187. See *supra* Part II.A.

188. See *supra* Part II.B.1.

189. *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960).

deficiencies in our statutes . . . is a matter for Congress, not for this Court.”¹⁹⁰

Having spotlighted in *Chevron* the task of interstitial policy making that Congress frequently leaves for others to perform,¹⁹¹ having applied in *Ewig Bros.* and *Steel Co.* an explicitly multifactored approach to statutory interpretation when ambiguous statutes are to be enforced without any prior agency view for courts to rely on, and having recognized in the nuisance cases that judges have considerable capability to resolve complex environmental questions, Stevens has set the stage for a more active and explicit judicial role in environmental enforcement cases. *Chevron*’s corollary, then, is that if the statute cannot be characterized as unambiguous, and if there is no pertinent, prior agency interpretation, the array of factors to be resorted to in ascertaining the legislative purpose should include the court’s best effort to perform the gap-filling task. The court should acknowledge, as Stevens described the chore in *Stearns*, that it is attempting to make a “principled decision[] in accordance with [Congress’s] basic statement of policy.”¹⁹² Applying his *Chevron* description, the court should try to find “a reasonable accommodation of manifestly competing interests,” “reconciling conflicting policies” and “resolving the competing interests which Congress itself . . . did not resolve.”¹⁹³

Even if a court is to do this, and candidly state what it is doing, some of the *Chevron* rationales for agency gap filling obviously still are inapplicable. The courts cannot claim technical expertise, nor do they have political accountability either through the Chief Executive or directly to the electorate. The latter difficulty may seem insurmountable, yet there are many things courts do, particularly in the realm of constitutional interpretation, that are far removed from correction at the ballot box. Furthermore, to the extent that judicial attempts at interstitial lawmaking produce outcomes that are strongly considered bad policy, legislative correction remains a real possibility.¹⁹⁴

Courts also cannot claim any explicit delegation of lawmaking power from Congress, as agencies ordinarily can. Nonetheless, as one scholar has sensibly asserted, “Congress implicitly delegates much of its lawmaking power to the judiciary.”¹⁹⁵ This observation pierces the legal fiction that courts are always, and merely, ascertaining and implementing a perceptible legislative intent. Nathanson, in contrast, characterized the effort as often a

190. *Id.* at 510 (Harlan, J., dissenting).

191. See generally John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 Ecology L.Q. 233 (1990).

192. *Stearns Elec. Paste Co. v. Env’tl. Prot. Agency*, 461 F.2d 293, 308-09 (7th Cir. 1972).

193. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

194. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 Fordham L. Rev. 1937 (2006) (emphasizing that the Court’s nondeferential approach to the Equal Employment Opportunity Commission leads to frequent legislative overruling of the Court’s antidiscrimination decisions).

195. Kahan, *supra* note 97, at 496.

futile “metaphysical search for a nonexistent legislative intent.”¹⁹⁶ Justice Stevens himself has embraced the concept of implicit delegation, at least with respect to the Constitution. Writing of “the vast open spaces in the text of that mysterious document,” he observed, “The authors of that document implicitly delegated the power to fill those spaces to future generations of lawmakers. Some of those decisions must be made by judges in the exercise of the power vested in them pursuant to Article III to decide cases or controversies.”¹⁹⁷

If the federal courts can be understood as having an implicit delegation to fill in spaces in the Constitution, should they not also have implicit authority to make specific law in furtherance of incompletely stated legislative enactments? This conclusion seems particularly compelling when Congress has made the choice to vest enforcement authority directly in the courts in either a civil or criminal format. Even though this gap-filling power has been only implicitly conferred, it can be explicitly exercised.

Can it be exercised with restraint? Certainly in a given case, whether it be an evaluation of the statutory treatment of DDT in smoked chubs or an assessment of whether a citizen can sue for environmental reporting violations that already have been corrected, the court can make an addition to the litany of sources and considerations bearing on the search for meaning in an incomplete or unclear statute. It can add to the equation a statement of its carefully thought out reconciliation of conflicting policies and resolution of competing interests left unresolved by Congress. Viewing the task in this way, the choice to perform it need not be seen as an all-or-nothing exercise, for it neither places judges in the driver’s seat of policy making nor ejects them from this moving vehicle entirely.

Indeed, the Court has recognized just how dynamic the task is, for in a recent decision it further considered the relationship and timing as between judicial and agency interpretations of ambiguous statutes. In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,¹⁹⁸ the Court held, “A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”¹⁹⁹ Conversely, if the court’s interpretation pertains to an ambiguous statute, the agency remains free thereafter to “choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”²⁰⁰

196. See also Daniel A. Farber, *Eco-pragmatism* 124 (1999) (“The whole concept of legislative intent is itself subject to vigorous attack, based largely on skepticism about whether groups of legislators share a coherent, let alone public-spirited, set of intentions.”).

197. Stevens, *supra* note 173, at 451-52.

198. 125 S. Ct. 2688 (2005).

199. *Id.* at 2700. Stevens filed a two-sentence concurring opinion solely to reemphasize this point. *Id.* at 2712.

200. *Id.* at 2701.

In these comments, the Court implicitly is assuming that the agency has the delegated authority to perform the gap-filling function but, for whatever reason, has not exercised it before a court has been asked to do so. As mentioned earlier,²⁰¹ this is one of two scenarios that may bring an environmental enforcement case to court without any prior agency position having been taken. In this scenario, the *Brand X* decision allows for judicial interpretation of an ambiguous statute subject to later reinterpretation by the authorized agency. That result is entirely consistent with the suggested *Chevron* corollary, even though the court's gap-filling interpretation may later be eclipsed by the agency.

In the other scenario, there is no prior agency view because the agency has not been delegated the authority to adopt one. Although *Brand X* on its facts did not present this context, the Court seemed incidentally to recognize it. After the above-quoted statement concerning the agency's exercise of its power as "authoritative interpreter," the Court continued, "In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable)."²⁰² Presumably one instance in which *Chevron* is inapplicable is when the agency lacks delegated authority to render a gap-filling interpretation. Accordingly, the Court seems to be acknowledging, albeit in passing, judicial power to articulate "binding law" on the basis of ambiguous statutes in some cases.

In environmental disputes, as the federal nuisance cases remind us and state law nuisance cases probably should as well, judges have the capability to exercise this power, even if it involves complicated balancing judgments. Indeed, in nuisance cases there is generally much less available by way of common law policy guidance for judges' efforts than is available as statutory guidance in environmental enforcement cases.

If courts are unwilling to take this approach, and to enter the door that this corollary of Stevens's opinion in *Chevron* has opened, there are at least two other alternatives. One is to continue with the fiction that courts never do anything more in environmental enforcement than simply ascertain the legislative intent and implement it.²⁰³ After *Chevron*, of course, the transparency of this fiction is more evident than ever. The other alternative for the courts is the one suggested by Harlan's dissents in the Rivers and Harbors Act cases: Do nothing more than whatever Congress clearly called

201. See *supra* text accompanying notes 191-95.

202. *Nat'l Cable & Telecomm. Ass'n*, 125 S. Ct. at 2701.

203. During Stevens's Supreme Court confirmation hearings, he wrote,

In the process of construing the Constitution or an act of Congress, a judge should not give the words used in such a document a meaning other than the meaning fairly intended by its authors. It is not a proper judicial function to amend either the Constitution or the statutes enacted pursuant thereto.

Letter from John Paul Stevens to Senator James O. Eastland, *supra* note 149, at 8. He also wrote, however, "It is never appropriate for a judge interpreting the Constitution, or indeed interpreting a statute, to disregard the intent of its authors to the extent that such intent can be fairly ascertained." *Id.*

for at the time it passed the law and then let the chips fall where they may until Congress decides to do something else.²⁰⁴ The importance of the policy goals embodied in modern environmental legislation, and the Court's frequent recognition of statutory gaps that need filling, militate against relegating the judiciary to such an uncooperative and unproductive role.²⁰⁵

Instead of these options, *Chevron's* corollary should be heeded by the federal courts when faced with direct environmental enforcement cases. If this function were fulfilled explicitly, the judicial role in that category could become more constructive and transparent, even while the court's function in cases where there is a prior agency exercise of delegated policy power remains deferential. The added clarity accompanying these different judicial orientations in these different types of cases could go a long way toward harmonizing the original, and continuing, hopes for the courts with the reality of what they can do.

The nuisance type of environmental case seems unlikely to be revived as a matter of federal common law, although litigants occasionally make bold efforts to do so.²⁰⁶ Thus it is only in the enforcement realm that there is a real prospect for a more forthright and active role. That category is particularly important because litigation seeking enforcement of NEPA continues to arise frequently. A thorough exploration of the treatment of NEPA by the Supreme Court, and by Justice Stevens in particular, is beyond the scope of this Article. Nevertheless, it is worth noting that

204. An analogous argument, linked to revival of the nondelegation doctrine, can be found at John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 131-34 (1980).

205. Cf. Dwyer, *supra* note 191, at 302 ("At the extremes, the court can either interpret literally or nullify symbolic legislation in an effort to force Congress to deal concretely with the underlying policy issues. Alternatively, a court can engage in or tolerate a certain amount of instrumental interpretation either by interpreting the statute itself to remove the symbolic conditions or limitations, or by deferring to the agency's reformulation. None of these approaches is ideal. But, given the relative capacities of courts and agencies to compel congressional reform or to produce a functional regulatory program, deference is the best approach.").

206. See, e.g., *Connecticut v. Am. Elec. Power Co.*, Nos. 04 Civ. 5669, 5670, 2005 U.S. Dist. LEXIS 19964 (S.D.N.Y. Sept. 15, 2005), *appeal docketed*, Nos. 05-5104, 05-5119 (2d Cir. Sept. 22, 2005). In dismissing the global warming nuisance complaints as raising nonjusticiable political questions, the court noted that the defendants also had moved to dismiss on the ground that "there is no recognized federal common law cause of action to abate greenhouse gas emissions that allegedly contribute to global warming." *Id.* at *15. The court also relied on *Chevron* to emphasize that the case raised complex challenges of balancing environmental and economic concerns. The court stated,

In this case, balancing those interests, together with the other interests involved, is impossible without an "initial policy determination" first having been made by the elected branches to which our system commits such policy decisions, viz., Congress and the President.

Plaintiffs advance a number of arguments why theirs is a simple nuisance claim of the kind courts have adjudicated in the past, but none of the pollution-as-public-nuisance cases cited by Plaintiffs has touched on so many areas of national and international policy. The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation.

Id. at *21.

environmental activists and many scholars have long been dismayed and frustrated by the Court's treatment of the statute.

At times it appears that the Court has miscategorized NEPA cases, treating them as examples of judicial review of agency action for which deference to an agency's views is apt.²⁰⁷ Fortunately, Justice Stevens has properly understood that NEPA cases are enforcement cases, essentially citizen suits against government agencies as alleged violators of the law, even though the cases come to court under the judicial review provisions of the Administrative Procedure Act. What is not encouraging is that in his NEPA opinions Stevens has rejected the possibility of injecting the courts to any degree into the kind of policy resolution and gap filling discussed above.²⁰⁸

Perhaps that aversion is justified by the tremendous scope of NEPA, as it applies to virtually all federal agencies and to an extraordinary array of government actions. It is understandable that courts might wish to avoid what they see as a limitless quagmire. Even so, as others have forcefully argued,²⁰⁹ much of the real strength of the congressional policies embodied in NEPA has been sapped by the Court's refusal to grapple with substantive outcomes of agency action subject to NEPA, rather than exclusively with agencies' compliance with NEPA procedures.

With a better understanding that NEPA cases are enforcement cases, and that courts have an important contribution to make under the *Chevron* corollary in giving more specific content to policy pronouncements under NEPA and other environmental statutes, perhaps it is still not too late for the federal judiciary to play a greater, more constructive role in enforcement of this and other vital environmental laws.

207. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976). In *Andrus v. Sierra Club*, 442 U.S. 347 (1979), the Court held that interpretation of NEPA by the Council on Environmental Quality ("CEQ") "is entitled to substantial deference." *Id.* at 358; see also *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 713-14 (1973) (Douglas, J., dissenting in part) (describing CEQ as "the expert ombudsman in the environmental area" and urging that its view "should be our guide"). In view of the CEQ's role as the expert overseer of NEPA, deference seems entirely warranted. CEQ, however, is probably the federal agency least likely ever to be sued for violating NEPA. It is difficult to see grounds for deferring to the NEPA interpretations of any other federal agency charged with violating the Act.

208. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989).

209. Farber, *supra* note 196, at 126-27. Arguing for "an environmental canon" of statutory interpretation, Farber relies in large part on NEPA and states, "The Supreme Court has ruled that a court has no power to review whether a particular agency action comports with [NEPA's] policies, assuming a valid impact statement exists. Nevertheless, there is a strong argument in favor of applying these policies to the interpretation of ambiguous statutes." *Id.* at 126; accord Eric Pearson, *Environmental and Natural Resources Law* 195-96 (2d ed. 2005).